165-482

165-482

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~699~~. 319

THE UNITED STATES, APPELLANT,

vs.

THE UNION PACIFIC RAILWAY COMPANY, HENRY GAY, M. J. WELLSLOGER, AND WILLIAM HOARD.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED AUGUST 15, 1895.

(15989.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 699.

THE UNITED STATES, APPELLANT,

vs.

THE UNION PACIFIC RAILWAY COMPANY, HENRY GAY, M. J. WELLSLOGER, AND WILLIAM HOARD.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May term, 1895, of said court, begun and held at the United States court-house in the city of St. Paul, Minnesota, on the first Monday, to wit, the sixth day, of May, A. D. 1895, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

Attest:

[SEAL.] JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the 28th day of June, A. D. 1894, a transcript of record, in pursuance to an appeal allowed by the circuit court of the United States for the district of Kansas, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in the case of The United States of America, appellant, vs. The Union Pacific Railway Company et al., appellees, which said transcript of record is in the words and figures following, to wit:

1 The United States of America. To the Union Pacific Railway Company, Henry Gay, M. J. Wellsloger and William Hoard—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, wherein the United States of America plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John A. Riner, District Judge assigned to hold the Circuit Court of the United States for the District of Kansas, this 28th day of May in the year of our Lord, one thousand eight hundred and ninety-four.

JOHN A. RINER,

United States District Judge for the District of Wyoming, assigned to hold the Circuit Court for the District of Kansas.

No. 6886. United States Circuit Court, Division of the Judical District of Kansas. United States vs. Union Pacific Railway Company et al. Citation. Filed June 10, 1894. Geo. F. Sharitt, Clerk.

Salina, Kansas, June 1, 1894.

We hereby accept service of the within citation: A. L. Williams, and N. H. Loomis, Attys., for Union Pacific Ry. Co. Garver & Bond, attorneys for Wm. Hoard, M. J. Wellslager, Bishop and Burch, Attys. for Henry Gay.

Service $8.00.

2 In the Circuit Court of the United States in and for the District of Kansas, First Division.

The United States of America, Complainant,

vs.

The Union Pacific Railway Company, Henry Gay, M. J. Wellsloger and William Hoard, Defendants.

To the Honorable Judges of said Circuit Court of the United States for the First Division of the District of Kansas:

The United States of America, by J. W. Ady, United States Attorney, acting in that behalf by authority of the Attorney

General of the United States, brings this, its bill of complaint, against the Union Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the United States, Henry Gay, M. J. Wellslager and William Hoard, and thereupon your orator complains and says:

That the Union Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the United States, and that the matter in dispute herein exceeds the sum or value of two thousand dollars exclusive of interest and costs.

And your orator further complaining says that on the 21st day of June, 1866, and for a long time prior to said date, your orator was the owner of the following parcel and tract of land to-wit: The northeast quarter of section one (1) township fifteen (15) south of range three, (3) west, in Saline County, Kansas, which said land had been duly surveyed and was a part of the public land of the United States, subject to disposal by the Congress of the United States under the provisions of the public land laws relating to homesteads and preemptions then and theretofore enacted and in full force and operation, and that said land was within the jurisdic-
3 tion of the Salina Land Office.

And your orator further avers that by an act of Congress of July 1st, 1862, in aid of the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and the several acts amendatory thereto, there was granted to the predecessor of said Union Pacific Railway Company as aid to the construction of said railroad and telegraph line, every alternate section of land designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad on the line thereof and within the limits of ten miles on each side of said road not so reserved or otherwise disposed of by the United States and to which a preemption or homestead claim may not have been attached at the time the line of said road should be definitely fixed.

And your orator further avers that by the act of Congress of 1862 aforesaid the said grant was made to the Leavenworth, Pawnee and Western Railroad Company of Kansas; that subsequently by an act of Congress the name of this defendant was changed to the Union Pacific Railway Company, Eastern Division, which last mentioned name was subsequently changed by act of Congress to the Kansas Pacific Railway Company; that the said Kansas Pacific Railway Company was subsequently consolidated with this defendant, The Union Pacific Railway Company, which succeeded to all the rights of its predecessors under the acts of Congress aforesaid,

and under the land grants aforesaid mentioned, and assumed all the liabilities under and by virtue of the several acts of Congress and the act of consolidation of said several names before mentioned.

And your orator further avers that prior to the definite way Company before its consolidation with the Union Pacific Railway Company, as hereinbefore mentioned, being authorized by law so to do, duly designated the general route of its road by filing a map in the office of the Commissioner
4 of the General Land Office at Washington, D. C., on the 14th day of July, 1866, and duly filed a map of definite location of the line of said road opposite the tract of land hereinbefore described on May 8th, 1867.

And your orator further avers that prior to the definite location of the line of road as aforesaid and prior even to the filing of the map of its general route and before the operation of said grant hereinbefore referred to, and while the said land was subject to homestead and pre-emption entry, to-wit, on the 21st day of June, 1866, one Charles Elder filed his declaratory statement alleging settlement upon the said land under the pre-emption laws of the United States on the 18th day of June, 1866, and which said declaratory statement was filed in the U. S. Land Office at Salina, Kansas, and was then and there known as number 3,970; that in settling upon said land the said Charles Elder complied with all the laws relating to the proper entry of the public land by pre-emption entry and that said entry was in full force and effect prior to and at the time of the definite location of said line of road opposite to said tract of land and prior to and at the time when the rights of said railroad company could have attached, if at all.

And your orator further avers that the said pre-emption entry of the said Charles Elder was cancelled Oct. 3rd, 1871; that J. G. Mohler made homestead entry upon said tract of land upon the 29th day of September, 1871, in the U. S. Land Office, at Salina, Kansas, which said entry was then and there known as number 11,537; that by reason of the erroneous belief to the effect that said railroad company was entitled to said land under its grant, said homestead entry was wrongfully, improperly and erroneously cancelled on the 9th day of September, 1873.

And your orator further avers that on September 10th,
5 1874, a patent was erroneously and illegally issued by the proper officers of the United States to the Kansas Pacific Railway Company, the predecessor of said defendant, The Union Pacific Railway Company, and that the said defendant claimed a title to said land under and by virtue of said patent so illegally issued as aforesaid.

And your orator further avers that a demand was duly and formally made upon the said Union Pacific Railway Company for the re-conveyance of said land to the United States of America, which demand the said railroad company has continuously and still refuse to comply with.

And your orator further avers and shows unto your honors that the said Kansas Pacific Railway Company on the 11th day of March, 1873, deeded said land by warranty deed to one Milo N. Powers, which said deed is recorded in Volume H., page 333 of the records of Saline County, Kansas, and that through sundry and mesne conveyances one William Hoard claims title to said land, and that Henry Gay and M. J. Wellslager claim to have some interest in said land by virtue of certain alleged mortgages given by William Hoard and wife and his grantor, but your orator avers that the matters hereinbefore stated were matters of public record at the time the said defendants, and each of them, took the said conveyance under which they claim a lien and title to said tract of land, but your orator further avers that the said defendants, the Union Pacific Railway Company, Henry Gay, M. J. Wellsloger and William Hoard, have no claim, interest in or title to said tract of land, but that said defendants lay claim and title to said land wrongfully and without legal right.

In consideration whereof, and inasmuch as your orator can only have adequate relief in the premises in this honorable court where matters of this nature are properly cog-
6 nizable and relievable, your orator prays that this honorable court may order, adjudge and decree that the legal title in and to said land, to-wit: the northeast quarter of section one (1), in township fifteen (15), south of range three (3) west, in Saline County, Kansas, is vested in your orator and of right belongs to your orator; that the patent issued September 10th, 1874, be adjudged and decreed utterly void and of no effect either in law or equity; that the defendant, the Union Pacific Railway Company, be required to bring the said patent into this court to be there delivered for cancellation; that this honorable court will adjudge and decree that said patent be declared void and not be considered a cloud upon the legal title of your orator to said land; that this honorable court will adjudge and decree that the said mortgage deeds given to Henry Gay and M. J. Wellsloger individually, and that the deed of the said William Hoard to said tract of land be declared void and be not considered a cloud upon the legal title of your orator to said land; that said cloud upon the title of your orator be removed and that this court will enjoin and restrain said defendants from further setting up any title, right, or claim to said premises under and by virtue

of said patent or any of said subsequent conveyances. To the end, therefore, that the said defendant may, if it can, show why your orator should not have the relief hereby prayed, and may according to its best and utmost knowledge, [remembrance], information and belief, full, true, direct and perfect answer make to each and all the matters and things in this bill of complaint contained, and that as fully and as particularly as if the same were here repeated paragraph by paragraph, and it was specially interrogated thereunto severally; may it please your honors to grant to your orator a writ of subpoena ad respondendum, issuing out of and under the seal of this honorable court, to be directed to said de-
7 fendants commanding them on a certain day and under a certain penalty to be therein inserted, to appear before your honors in this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises; and, further, to stand to, perform and abide by such further order or decree as to your honors shall seem meet; and your orator as in duty bound will ever pray, etc.

J. W. ADY,
United States Attorney and Solicitor for Complainant.

P. L. SOPER, of Counsel.

United States of America,
District of Kansas—ss.

On this 18 day of August, 1892, before me personally appeared P. L. Soper to me well known as such, and who being duly sworn did depose and say that he was and is Asst. United States Attorney for the District of Kansas; that the foregoing bill of complaint is signed by him in his own proper handwriting; that he has read said bill and knows its contents, and that the matters and things therein contained are true as shown by the records of the U. S. Land Office & Reg. of Deeds of Saline County, Kansas, and as he verily believes except as to such matters as are stated on information and belief, and that as to those matters, he believes them to be true.

P. L. SOPER,

Subscribed and sworn to before me this 18th day of August, 1892.

Clerk United States Circuit Court, District of Kansas.

8 Indorsed.—No. 6886. In the Circuit Court of the United States Dist. of Kas. The U. S. vs. The Union Pacific Ry. Co. et al. Bill of Complaint. Filed Aug. 18, 1892. Geo. F. Sharitt, Clerk.

9 United States of America,
District of Kansas, First Division—ss.

The United States of America: To The Union Pacific Railway Company, Henry Gay, M. J. Wellslager, and William Hoard, Greeting:

We command you and every of you, that you appear before our Judge of our Circuit Court of the United States of America for the District of Kansas, at the city of Topeka, in said District, on the first Monday in the month of October next, to answer the Bill of Complaint of The United States of America this day filed in the Clerk's office of said court, in said city of Topeka, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the District of Kansas to Execute.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United
[Seal] States of America, at the city of Topeka, in said district, this 18th day of August, in the year of our Lord one thousand eight hundred and ninety-two.

GEO. F. SHARITT, Clerk.

Memorandum.—The above-named defendants are notified that unless they enter their appearance in the Clerk's office of said court, at the city of Topeka aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

GEO. F. SHARITT, Clerk.

No. 6886. Circuit Court United States, District of Kansas, First Division. The United States of America vs. The Union Pacific Railway Company et al. Chancery Subpoena. Returnable to rule day, first Monday in October A. D. 1892. Geo. F. Sharitt, Clerk. Filed Aug. 25, A. D. 1892. Geo. F. Sharitt, Clerk. J. W. Ady, Compt's Sol.

U. S. MARSHAL'S RETURN.

District of Kansas—ss.

Received the within writ August the 18, 1892, and executed the same as follows, to-wit: Served on the within named defendants M. J. Wellslager at Saline County, State and District of Kansas on the 24th day of August, 1892, by delivering to him personally a true and certified copy of this writ with all the indorsements thereon, and at the same time and place

served same on the within named defendant The Union Pacific Railway Company by delivering to W. S. Burr personally a like copy of this writ as aforesaid, the said W. S. Burr being then and there the station and ticket agent of said defendant, and served same on the within named defendant William Hoard by leaving a like copy of this writ as aforesaid at his usual place of abode in the hands of Mrs. Hoard, an adult member of his family—and after diligent search have been unable to find the within named defendant Henry Gay in my district nor any place of residence of said defendant.

R. L. WALKER, Marshal.
By JAS. McMURRAY, Deputy.

Service	$6.00
Travel (124 mi.)	7.44
	$13.44

10 In the Circuit Court of the United States for the District of Kansas.

SEPARATE ANSWER OF THE ABOVE NAMED DEFENDANT WILLIAM HOARD TO THE BILL OF COMPLAINT HEREIN.

The United States of America, Complainant,
vs.
The Union Pacific Railway Company, Henry Gay, M. J. Wellslager and William Hoard, Defendants.

In answer to the said bill of complaint said William Hoard says as follows:

He admits that prior to September 10, 1874, said complainant was the owner of the tract of land described in said bill of complaint, to-wit: The northeast quarter of section one (1), Township fifteen (15), south of range three (3) west in Saline County, Kansas, and that the same was a part of the public lands of the United States, subject to disposal by the Congress of the United States.

Said William Hoard admits, that the Union Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the United States and is, and was on the 10th day of September, 1874, the successor in interest to the grant of public lands made by an act of Congress on July 1st, 1862, to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and the several acts amendatory thereto, as alleged in said bill of complaint, and that a map designating the route of the

road to be constructed was filed in the office of the Commissioner of the General Land office at Washington, D. C. on the 14th of July, 1866.

Said William Hoard says, that on the——day of——, 1868, said railroad and telegraph line was constructed opposite the tract of land hereinbefore described and that the same was situated within the ten-mile limit from said road.

11 Said defendant William Hoard, admits that said tract of land subject to homestead and pre-emption entry prior to the time of the filing of the map of the location of said line of road, and that one Charles Elder filed his declaratory statement therefor, under the pre-emption laws of the United States, on the 21st day of June, 1866, in the United States Land Office at Junction City, Kansas, now included within the Salina, Kansas District; but denies that said Charles Elder at any time made settlement upon said land as required by the pre-emption laws of the United States and avers the fact to be, that at no time either before or after the filing of said declaratory statement, did said Charles Elder make settlement upon, or in any manner improve, said tract of land, or do anything with reference thereto, except to file his declaratory statement in the United States Land Office, and no legal claim ever attached to said tract of land by reason of said declaratory statement.

Said defendant admits, that the said declaratory statement of said Charles Elder was duly cancelled by the Commissioner of the General Land Office of the United States on October 3rd, 1871; that on September 29, 1871, one J. G. Mohler made a homestead entry on said tract of land under the Act of Congress known as the homestead law; and avers the fact to be, that said J. G. Mohler never entered upon said land to make any settlement or improvement thereon, and voluntarily submitted to the claims of the railroad company made with reference thereto.

Said defendant alleges that on the 10th day of September, 1874, the proper officers of the United States, in pursuance of the authority conferred upon them by law, and for the purpose of giving effect to the said grant of lands to aid in the construction of a railroad and telegraph line, fully investigated and considered the right of the Kansas Pacific

12 Railway Company, the predecessor of said defendant, The Union Pacific Railway Company, to said land, and certified the same for patent, and on said 10th day of Sept., 1874, a patent was duly executed and delivered by complainant to the Kansas Pacific Railway Company thereby conveying to said Kansas Pacific Railway Company all the

right, title and interest of said complainant in and to said tract of land, which said patent, after being delivered to said railway company, was by it filed for record in the office of the Register of Deeds of Saline County, Kansas, and duly recorded on Dec. 19, 1874, in Book "I" of Deeds at page 423.

Said defendant says, that on March 11, 1873, said Kansas Pacific Railway Company duly conveyed by warranty deed said tract of land to one Milo M. Powers; that on September 3rd, 1875, said Milo M. Powers by warranty deed duly conveyed said land to one Hartman Berg; that on April 22nd, 1881, said Hartman Berg by warranty deed duly conveyed said tract of land to one William H. Whitman; that on July 28, 1883, said William H. Whitman by warranty deed duly conveyed said land to one James Quinn; all of which conveyances were made to bona fide purchasers for valuable consideration and in reliance upon the title of said Kansas Pacific Railway Company acquired from complainant.

Said defendant William Hoard further says, that on September first 1885 he purchased said tract of land from said James Quinn for and in consideration of the sum of $5,000, a full and valuable consideration therefor, which was paid and received from said James Quinn and wife a warranty deed conveying the same; that in making said purchase and accepting said conveyance said defendant had no notice or knowledge of any kind of any defect in the title to said land or of the filing of said declaratory statement by said Charles Elder and relied upon the patent from the complainant to the Kansas Pacific Railway Company, and the conveyances subsequent thereto, and believed that by said conveyance
13 from said James Quinn and wife and the conveyances prior thereto, including said patent, he became vested with the full legal title to said land; that since the purchase of said land by said defendant he has been in actual and continuous possession thereof and there has been no claim set up or made to said land by any person other than such claim as has been made on behalf of the complainant, and this claim said complainant should not now be permitted to make.

Wherefore, said defendant prays that said complainant be not granted its prayer on said bill, and that the title of said defendant to said tract of land be confirmed.

WILLIAM HOARD,
By GARVER & BOND,
His solicitors.

State of Kansas,
Saline County—ss.

William Hoard being duly sworn deposes and says: that he is one of the above named defendants; that so much of the foregoing answer as concerns his own acts and deeds is true, and so much thereof as concerns the acts or deeds of other persons is true as he verily believes.

WM. HOARD.

Subscribed and sworn to before me this 28th day of September, 1892.

[Seal] ALEX. BERY, Notary Public.

My term expires May 26th, 1895.

Indorsed.—No. 6886. In Circuit Court of U. S. Dist. of Kans. The United States of America, Complt. vs. The Union Pacific Ry. Co. et al. Answer of William Hoard. Filed Sept. 29, 1892. Geo. F. Sharitt, Clerk.

14 In the Circuit Court of the United States for the District of Kansas (First Division.)

The United States of America, Complainant,

vs.

The Union Pacific Railway Co., Henry Gay, M. J. Wellsloger, and William Hoard, Defendants.

To the Clerk of said Court:

Please enter our appearance as solicitors for the Union Pacific Railway Company, defendant in the above entitled cause.

A. L. WILLIAMS,
N. H. LOOMIS and
R. W. BLAIR,
Solicitors for the Union Pacific Railway Co., Defendant.

Indorsed.—No. 6886. U. S. Circuit Court. United States vs. U. P. Ry. Co. Wellsloger et al. Entry of Appearance. No. 6886. Consent given to file as in time. J. W. Ady, Solr. for Complt. Filed Oct. 8, 1892. Geo. F. Sharitt, Clerk.

15 In the Circuit Court of the United States for the District of Kansas, (First Division.)

DEMURRER OF THE UNION PACIFIC RAILWAY COMPANY, DEFENDANT, TO THE BILL OF COMPLAINT OF THE UNITED STATES OF AMERICA, THE ABOVE NAMED COMPLAINANT.

The United States of America, Complainant,
vs.
The Union Pacific Railway Company, Henry Gay, M. J. Wellslager, and William Hoard, Defendants.

This defendant, by protestation, not confessing all or any of the matters and things in complainant's bill of complaint contained to be true in such manner and form as the same is herein set forth and alleged, doth demur to said bill and for cause of demurrer showeth that the said bill doth not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against this defendant.

Wherefore and for divers other good causes of demurrer appearing in said bill, the defendant doth demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

A. L. WILLIAMS,
N. H. LOOMIS,
R. W. BLAIR,

Solicitors for the Union Pacific Railway Co., Defendant.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

A. L. WILLIAMS,
of Counsel.

16 State of Kansas,
Shawnee County—ss.

N. H. Loomis, being duly sworn says that he is one of the solicitors for the defendant Union Pacific Ry. Co., in the above entitled cause, and that the foregoing demurrer is not interposed for delay.

N. H. LOOMIS.

Subscribed and sworn to before me this 5th day of November, 1892.

[Seal] FRANK E. SMITH, Notary Public.

Com. expires Feb. 27, 1894.

Indorsed.—No. 6886. Demurrer. Filed Nov. 7, 1892. Geo. F. Sharitt, Clerk.

17 In the Circuit Court of the United States for the First Division of the District of Kansas.

United States, Complainant,
vs.
Union Pacific Railway Company, Defendant.

The Clerk of said court will please make an entry in the order book setting down said cause for hearing upon bill of complaint and the answer of said defendant, William Hoard.

J. W. ADY, Solr. for Complt.

Indorsed.—No. 6886. U. S. vs. Union Pacific Ry. Co. et al. Precipe for entry in order book. Filed Dec. 5, 1892. Geo. F. Sharitt, Clerk.

18 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, begun and held at the city of Topeka, in said District on Monday the 28th day of November, 1892, proceedings were had, and appear of record in words and figures as follows, to-wit:

Saturday, Dec. 10, 1892.

The United States of America,

6886 vs.

The Union Pacific Railway Company et al.

Leave is hereby given plaintiff by the court, ten days in which to amend bill herein. Defendant to have ten days thereafter to answer.

19 In the Circuit Court of the United States in and for the District of Kansas, First Division.

AMENDED BILL OF COMPLAINT.

The United States of America, Complainant,
vs.
The Union Pacific Railway Company, Henry Gay, M. J. Wellsloger and William Hoard, Defendants.

To the Honorable Judges of said Circuit Court of the United States for the First Division of the District of Kansas.

The United States of America, by J. W. Ady, United States Attorney, acting in that behalf by authority of the Attorney General of the United States, leave of court being first had and obtained brings this, its amended bill of complaint, against

the Union Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the United States, Henry Gay, M. J. Wellslager and William Hoard, and thereupon your orator complains and says:

That the Union Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the United States, and that the matter in dispute herein exceeds the sum or value of two thousand dollars exclusive of interest and costs.

And your orator further complaining says that on the 21st day of June, 1866, and for a long time prior to said date, your orator was the owner of the following parcel and tract of land, to-wit: The northeast quarter of section one (1) township fifteen (15) south of range three (3) west, in Saline County, Kansas, which said land had been duly surveyed and was a part of the public land of the United States, subject to disposal by the Congress of the United States under the provisions of the public land laws relating to homesteads and pre-emptions then and theretofore enacted and in full force and operation, and that said land was within the jurisdiction of the Salina Land Office.

And your orator further avers that by an act of Congress of July 1st, 1862, in aid of the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and the several acts amendatory thereto, there was granted to the predecessor of said Union Pacific Railway Company as aid to the construction of said railroad and telegraph line, every alternate section of land designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad on the line thereof and within the limits of ten miles on each side of said road not so reserved or otherwise disposed of by the United States and to which a pre-emption or homestead claim may not have attached at the time the line of said road should be definitely fixed.

And your orator further avers that by the act of Congress of 1862, aforesaid the said grant was made to the Leavenworth, Pawnee and Western Railroad Company of Kansas; that subsequently by an act of Congress the name of this defendant was changed to the Union Pacific Railway Company, Eastern Division, which last mentioned name was subsequently changed by act of Congress to the Kansas Pacific Railway Company; that the said Kansas Pacific Railway Company was subsequently consolidated with this defendant, the Union Pacific Railway Company, which succeeded to all the rights of its predecessors under the acts of Congress aforesaid, and under the land grants aforesaid mentioned, and assumed

all the liabilities under and by virtue of the several acts of Congress and the act of the consolidation of said several names afore mentioned.

And your orator further avers that the Kansas Pacific Railway Company before its consolidation with the Union Pacific Railway Company, as hereinbefore mentioned, being authorized by law so to do, duly designated the general route of its road by filing a map in the office of the Commissioner of
20½ the General Land Office at Washington, D. C., on the 14th day of July, 1866, and duly filed a map of definite location of the line of said road opposite the tract of land hereinbefore described on May 8th, 1867.

And your orator further avers that prior to the definite location of the line of road as aforesaid and prior even to the filing of the map of its general route and before the operation of said grant hereinbefore referred to, and while the said land was subject to homestead and pre-emption entry, to-wit, on the 21st day of June, 1866, one Charles Elder filed his declaratory statement alleging settlement upon the said land under the pre-emption laws of the United States on the 18th day of June, 1866, and which said declaratory statement was filed in the U. S. Land Office of the United States at Salina, Kansas and was then and there known as number 3,970; that in settling upon said land the said Charles Elder complied with all the laws relating to the proper entry of the public land by pre-emption entry and that said entry was in full force and effect prior to and at the time of the definite location of said line of road opposite to said tract of land and prior to and at the time when the rights of said railroad company could have attached, if at all.

And your orator further avers that the said pre-emption entry of the said Charles Elder was cancelled Oct. 3rd, 1871; that J. G. Mohler made homestead entry upon said tract of land upon the 29th day of September, 1871, in the U. S. Land Office, at Salina, Kansas, which said entry was then and there known as number 11,537; that on the 23d day of October,
21 1871, without any notice to the said J. G. Mohler, the Commissioner of the General Land Office issued an order to the Register and Receiver of the United States Land Office at Salina, Kansas, within whose jurisdiction the land in question laid, a copy of which in so far as it relates here o, is attached to this amended bill and marked exhibit A; that on December 2d, 1871, without any notice thereof to the said J. G. Mohler, the Commissioner of the General Land Office, at Washington, D. C., issued an order to the Register and Receiver of the United States Land Office, at Salina, Kansas, a copy of which is hereto attached and marked Exhibit B, and made a part thereof; that

he said J. G. Mohler made an application for contest and a hearing was ordered on April 20th, 1872, by the Commissioner of the General Land Office and heard July 16th, 1872, and notice was served upon the said J. G. Mohler on May 11th, 1872; that by reason of the erroneous belief to the effect that said railroad company was entitled to said land under its grant, said homestead entry was wrongfully, improperly and erroneously cancelled on the 9th day of September, 1873.

And your orator further avers that the said J. G. Mohler has not located any other claim or made an entry in lieu of the one so erroneously cancelled, and that he did not voluntarily abandon said original entry and that by the erroneous rulings and action of the officers of the Interior Department he was precluded and prevented from complying with all the terms and conditions of the homestead act, to his great damage and detriment.

And your orator further represents and shows unto your honors that the said J. G. Mohler did on the 28th day of July, 1885, make application to purchase said land under the second section of the act of congress entitled "An Act relating to the public lands of the United States," approved June 15th, 1880, (see 21st Statutes at Large, 237,) and did do each and
22 every thing necessary for the consumation of said purchase and in order to procure title to said tract of land in him, the said J. G. Mohler.

And your orator further avers that said application was rejected by the Register and Receiver of the Land Office at Salina, Kansas, and was further rejected upon appeal by the Commissioner of the General Land Office at Washington, in the District of Columbia, and the Secretary of the Interior, and your orator avers that said rejections were without authority of law and to the manifest injury and detriment of said applicant.

23 And your orator further avers that on September 10th, 1874, a patent was erroneously and illegally issued by the proper officers of the United States to the Kansas Pacific Railway Company, the predecessor of said defendant, the Union Pacific Railway Company, and that the said defendant claimed a title to said land under and by virtue of said patent so illegally issued as aforesaid.

And your orator further avers that a demand was duly and formally made upon the said Union Pacific Railway Company for the re-conveyance of said land to the United States of America, which demand the said railroad company has continuously and still refuses to comply with.

And your orator further avers and shows unto your hon
that the said Kansas Pacific Railway Company on the 1
day of March, 1873, deeded said land by warranty deed to
Milo N. Powers, which said deed is recorded in Volume
page 333 of the records of Saline County, Kansas, and t
through sundry and mesne conveyances one William Hoa
claims title to said land, and that Henry Gay and M. J. We
lager claim to have some interest in said land by virtue of
tain alleged mortgages given by William Hoard and w
and his grantor, but your orator avers that the matters he
inbefore stated were matters of public record at the time
said defendants, and each of them, took the said conveyan
under which they claim a lien and title to said tract of la
but your orator further avers that the said defendants,
Union Pacific Railway Company, Henry Gay, M. J. We
loger and William Hoard, have no claim, interest in or ti
to said tract of land, but that said defendants lay claim a
title to said land wrongfully and without legal right.

In consideration whereof, and inasmuch as your orat
can only have adequate relief in the premises in this honora
court where matters of this nature are properly c
23½ nizable and relievable, your orator prays that this h
orable court may order, adjudge and decree that t
legal title in and to said land, to-wit: the northeast quart
of section one (1), in township fifteen (15), south of range thr
(3) west, in Saline County, Kansas, is vested in your orat
and of right belongs to your orator; that the patent issu
September 10th, 1874, be adjudged and decreed utterly v
and of no effect either in law or equity; that the defenda
the Union Pacific Railway Company, be required to bring t
said patent into this court to be there delivered for cancel
tion; that this honorable court will adjudge and decree th
said patent be declared void and not be considered a clou
upon the legal title of your orator to said land; that this h
orable court will adjudge and decree that the said mortga
deeds given to Henry Gay and M. J. Wellslager individuall
and that the deed of the said William Hoard to said tract
land be declared void and be not considered a cloud upon t
legal title of your orator to said land; that said cloud upon t
title of your orator be removed and that this court will enjo
and restrain said defendants from further setting up tit
right, or claim to said premises under and by virtue of sa
patent or any of said subsequent conveyances. To the en
therefore, that the said defendant may, if it can, show wh
your orator should not have the relief hereby prayed, and ma
according to its best and utmost knowledge, [remembrance
information and belief, full, true, direct and perfect answ
make to each and all the matters and things in this bill

complaint contained, and that as fully and as particularly as if the same were here repeated paragraph by paragraph, and it was specially interrogated thereunto severally; may it please your honors to grant to your orator a writ of subpoena ad respondendum, issuing out of and under the seal of this honorable court, to be directed to said defendants com-
24 manding them on a certain day and under a certain penalty to be therein inserted, to appear before your honors in this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises; and, further to stand to, perform and abide by such further order or decree as to your honors shall seem meet; and your orator as in duty bound will ever pray, etc.

J. W. ADY,
United States Attorney and Solicitor for Complainant.

P. L. SOPER, of Counsel.

United States of America,
District of Kansas—ss.

On this 20th day of December, 1892, before me personally appeared P. L. Soper, to me well known as such and who being duly sworn did depose and say that he was and is Asst. United States Attorney for the District of Kansas; that the foregoing bill of complaint is signed by him in his own proper handwriting; that he has read said bill and knows its contents, and that the matters and things therein contained are true as shown by the records of the United States Land Office and Register of Deeds of Saline County, Kansas, and as he verily believes except as to such matters as are stated on information and belief, and that as to those matters, he verily believe them to be true.

P. L. SOPER.

Subscribed and sworn to before me this 20th day of December, 1892.

[Seal] GEO. F. SHARITT,
Clerk United States Circuit Court, District of Kansas.

25 EXHIBIT A.

Copy.

Department of the Interior, General Land Office,

October 23d, 1871.

Register & Receiver, Salina, Kansas.

Gentlemen:—This office has examined the testimony and other papers sent up from Junction City in support of the ap-

plication of the Kansas Pacific Railroad Company to cancel the following declaratory filings, viz.:

3970, Charles Elder, June 21, 1866, on the N. E. ¼ 1-15S.

The above recited filings are all upon unoffered lands withdrawn for railroad purposes by our letter of June 14th, and received at the old Junction City office June 20th, 1867. Notice was given by the Kansas Pacific Railroad Company to each of the parties who placed said filings on record; a regular hearing was had in each case in accordance with such notice and from the testimony presented at the time of the several trials, the register and receiver reported in favor of cancelling said filings.

After a careful examination of the evidence presented in the above cases, we think the charge of abandonment fully sustained and this office concurs in the opinion of the local officers and the above list of declaratory filings are this day cancelled on our records. You will make the proper notes on your books and inform this office of the date of such action, referring to this in the usual way.

Very respectfully,

(Sgd.) W. DRUMMOND, Commissioner.

26 EXHIBIT B.

Copy.

Department of the Interior, General Land Office,
Washington, D. C., Dec. 2d, 1871.

Register and Receiver, Salina, Ks.

Gentlemen:—Referring to our letter of 23rd Oct. last, cancelling the abandoned filings on tracts of land within the limits of the Kansas Pacific Railroad, withdrawal of June 14th, 1867, you are now advised that a re-examination of said cases has been made, with a view of ascertaining, which, if any, of said fllings was founded, on a valid settlement in order to enable this office to determine whether the lands reverted to the United States Government, or was open to selection by the company in accordance with the decision of the Hon. Secretary of the Interior, of April 28th, 1871, and our circular of Nov. 7, 1871. From the evidence presented it is found that in the following cases settlement *was made prior to filing*, and upon the cancellation of said filings the land reverts to the government:

E. F. Millard, D. S. 4156 S. W. ¼ 27-13-3 W.
W. J. Ewing, D. S. 4476, N. E. ¼ 13-17-8 W.

In the following cases the testimony fails to show whether the filing was preceded by settlement or not, and the railroad

company will be required to establish the fact that there never had been improvements placed on the tracts so filed for, before they can secure title to the roads.

C. M. Cutler, D. S. 4234, W. ½ of N. W. 31 and S. ½ S. W. ¼ sec. 30-17-3 W.

S. J. Hunter, D. S. 3181 S. W. ¼ 27-15 S. L. W.

S. D. Shields, D. S. 4315 N. ½ N. E. ¼, S. E. ¼ of N. E. ¼, 9 and N. W. ¼ N. W. ¼ 10-17-3 W.

27 Peter Lindell, D. S. 3739 N. W. ¼ Sec. 35-13-3 west.

J. W. Webster, D. S. 3717 N. W. ¼ 33-13-1 W.

C. F. King, D. S. 4003 S. ½ N. W. ¼ N. ½ S. W. ¼ Sec. 33-13-1 west.

Jas. W. Humphreys, D. S. 4204 S. ½ N. W. ¼ and W. ½ S. W. ¼ 33-13-1 west.

Edward Hastings, D. S. 4321 E. ½ S. W. ¼ & W. ½ S. E. ¼ Sec. 3-16-7 west.

Wm. Hunton, D. S. 3304 E. ½ of N. W. ¼ & N. ½ S. W. ¼ 17-12-6 W.

M. Smith, D. S. 3860 E. ½ N. W. ¼ and N. ½ S. W. ¼ 17-12-6 W.

Wm. E. Thompson, D. S. 3955 E. ½ N. W. ¼ & N. ½ S. W. ¼. 17-12-6 W.

P. H. Hopkins, D. S. 2849 S. ½ S. E. ¼ and N. W. ¼ S. E. ¼ Sec. 1-9- S. 8 E.

All the other filings in said list are [show-] by the testimony in each case to have been made without a prior settlement, and were therefore invalid and the land embraced in said filings will pass to the railroad without any further action upon the filings.

Very respectfully,

(Signed) WILLIS DRUMMOND, Commissioner.

Indorsed.—In Circuit Court of U. S. Dist. Ks. No. 6886. U. S. vs. Union Pacific Railway Company et al. Amended bill of complaint. Filed Dec. 20, 1892. Geo. F. Sharitt, Clerk.

28 In the Circuit Court of the United States for the District of Kansas.

AMENDED SEPARATE ANSWER OF THE ABOVE NAMED DEFENDANT, WILLIAM HOARD TO THE AMENDED BILL OF COMPLAINT HEREIN.

The United States of America, Complainant,

vs.

The Union Pacific Railway Company, Henry Gay, M. J. Wellslager and William Hoard, Defendants.

In answer to the said bill of complaint as amended said William Hoard says: That he is a natural born citizen of the

United States. He admits that prior to September 10, 1874, said complainant was the owner of the tract of land described in said bill of complaint, to-wit: The northeast quarter of section one (1) township fifteen (15) south of range three (3) west in Saline County, Kansas, and that the same was a part of the public lands of the United States, subject to disposal by the Congress of the United States.

Said William Hoard admits that the Union Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the United States and is, and was on the 10th day of September, 1874, the successor in interest to the grant of public lands made by an Act of Congress on July 1st, 1862, to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and the several Acts amendatory thereto, as alleged in said bill of complaint, and that a map designating the route of the road to be constructed was filed in the office of the Commissioner of the General Land Office at Washington, D. C. on the 14th of July, 1866.

Said William Hoard says, that on the—day of ——1868, said railroad and telegraph line was constructed opposite the tract of land hereinbefore described and that the same was situated within the ten mile limit from said road.

29 Said defendant, William Hoard, admits that said tract of land was subject to homestead and pre-emption entry prior to the time of the filing of the map of the location of said line of road and that one Charles Elder filed his declaratory statement therefor, under the pre-emption laws of the United States, on the 21st day of June, 1866, in the United States Land Office at Junction City, Kansas, now included within the Salina, Kansas, district; but denies that said Charles Elder at any time made settlement upon said land as required by the pre-emption laws of the United States and avers the fact to be, that at no time either before or after the filing of said declaratory statement, did Charles Elder make settlement upon, or in any manner improve, said tract of land, or do anything with reference thereto, except to file his declaratory statement in the United States Land Office, and no legal claim ever attached to said tract of land by reason of said declaratory statement.

Said defendant admits, that the said declaratory statement of said Charles Elder was duly cancelled by the Commissioner of the General Land Office of the United States on October 3rd, 1871; but alleges that such cancellation was made pursuant to the findings and decision of the Commisioner of the General Land Office duly made in contest proceedings pending in the land office of the district within which said tract of land was situated, in which said contest one of the issues submitted for

decision by the officers of the land department was, whether said Charles Elder had, prior to the filing of his declaratory statement, made settlement upon said tract of land; and it was found after such hearing and upon the evidence then presented and the facts then proven that no such prior settlement had been made. That such decision of the Commissioner of the General Land Office was transmitted to the Register and Receiver of the Land Office at Salina, Kansas, by a letter from said Commissioner, dated December 2nd, 1871, and is the
30 letter of which a copy is attached to complainant's amendment to the bill filed herein, and said filing of said Charles Elder is one of the filings named in said letter with reference to which the Commissioner finds that it is shown by the testimony "to have been made without any proper settlement and were therefore invalid, and the land embraced in said filings will pass to the railroad without any further action upon the filings."

Said defendant admits that one J. G. Mohler made homestead entry No. 11,537 on said tract on Sept. 29, 1871; but avers, that at the time said entry was made, and at all times from that date to this, said J. G. Mohler was and has been an actual resident in the city of Salina and at no time entered upon said land for the purpose of making any settlement or improvements thereon, and no settlement was at any time made on said land by him, and he voluntarily abandoned the same without attempting a compliance with the requirements of the Homestead Act of Congress. Defendant denies that any action was taken by the officers of the Land Department of the United States Government, or by any other person or corporation to question the validity of said entry of said J. G. Mohler on Dec. 2, 1871, or at any other date within six months after said homestead entry was made; but avers that by letter dated April 20, 1872, the Commissioner of the General Land Office ordered a hearing in the Salina office as to the validity of said entry, and a hearing was had thereon July 16, 1872, in the land office at Salina, Kansas, and the testimony offered at such trial was duly transmitted to the Commissioner of the General Land Office at Washington with the opinion of the register and receiver thereon; that the Commissioner of the General Land Office, having considered the evidence in said case, by letter, dated May 15, 1873, ordered that said entry be cancelled, and found as a fact, from the evidence
31 produced upon said hearing, as follows: "The records and the evidence transmitted by you show that Charles Elder filed declaratory statement No. 3970 for the tract in question June 21, 1866 alleging settlement, June 18, 1866 that the filing was not preceded by personal settlement; that Elder never lived upon or improved the land himself."

Said J. G. Mohler had due notice of said hearing, was a party thereto and participated therein, and one of the issues in said hearing was whether said Charles Elder had made settlement on said tract of land prior to the filing of his declaratory statement therefor.

Said defendant alleges, that on the 10th day of September, 1874, the proper officers of the United States, in pursuance of the authority conferred upon them by law, and for the purpose of giving effect to the said grant of lands to aid in the construction of a railroad and telegraph line, fully investi-
32 gated and considered the right of the Kansas Pacific Railway Company, the predecessor of said defendant, The Union Pacific Railway Company, to said land, and certified the same for patent, and on said 10th day of Sept., 1874, a patent was duly executed and delivered by complainant to the Kansas Pacific Railway Company thereby conveying to said Kansas Pacific Railway Company all the right, title and interest of said complainant in and to said tract of land, which said patent, after being delivered to said railway company, was by it filed for record in the office of the Register of Deeds of Saline County, Kansas, and duly recorded on Dec. 19, 1874, in Book "I" of Deeds at page 423.

Said defendant says, that on March 11, 1873, said Kansas Pacific Railway Company duly conveyed by warranty deed said tract of land to one Milo M. Powers; that on September 3rd, 1875, said Milo M. Powers by warranty deed duly conveyed said land to one Hartman Berg; that on April 22nd, 1881, said Hartman Berg by warranty deed duly conveyed said tract of land to one William H. Whitman; that on July 28, 1883, said William H. Whitman by warranty deed duly conveyed said tract of land to one James Quinn; all of which conveyances were made to bona fide purchasers for valuable consideration and in reliance upon the title of said Kansas Pacific Railway Company acquired from complainant.

Said defendant William Hoard further says, that on September first 1885 he purchased said tract of land from said James Quinn for and in consideration of the sum of $5,000, a full and valuable consideration therefor, which was paid and received from said James Quinn and wife a warranty deed conveying the same; that in making said purchase and accepting said conveyance said defendant had no notice or knowledge of any kind of any defect in the title to said land or of the filing of said declaratory statement by said Charles Elder and relied upon the patent from the complainant to

the Kansas Pacific Railway Company, and the conveyances subsequent thereto, and believed that by said convey-
32½ ance from said James Quinn and wife and the conveyances prior thereto including the said patent, he became vested with the full legal title to said land; that since the purchase of said land by said defendant he has been in actual and continuous possession thereof and there has been no claim set up or made to said land other than such claim as has been made on behalf of the complainant, and this claim said complainant should not now be permitted to make.

Wherefore, said defendant prays that said complainant be not granted its prayer on said bill, and that the title of said defendant to said tract of land be confirmed.

GARVER & BOND,
Attys. for Defendant Hoard.

State of Kansas,
Saline County—ss.

William Hoard being duly sworn deposes and says: that he is one of the above named defendants; that so much of the foregoing answer as concerns his own acts and deeds is true, and so much thereof as contains the acts and deeds of other persons is true as he verily believes.

WM. HOARD.

Subscribed and sworn to before me this 12th day of Jan., 1892.

[Seal] ALEX. BERRY, Notary Public.

My term expires May 26th, 1895.

Indorsed.—No. 6886. U. S. Circuit Court, District of Kans. United States of America, Complainant, vs. The U. P. Ry. Co. et al. Defendants Answer of Wm. Hoard to Amended Bill. Filed Jany. 13, 1893. Geo. F. Shariff, Clerk. Garver & Bond, Atty. for Wm. Hoard.

33 In the Circuit Court of the United States for the District of Kansas, First Division.

STIPULATION.

The United States of America, Complainants,
vs.
The Union Pacific Railway Company, Henry Gay, M. J. Wellsloger and William Hoard, Defendants.

It is stipulated by and between complainants and the defendant. The Union Pacific Railway Company, in the above entitled suit, that the answer filed in said suit on behalf of the other defendants shall stand and be taken as and for the an-

swer of the said defendant, The Union Pacific Railway Company, to said amended bill.

W. C. PERRY,
United States Attorney and Solicitor for Complainants.

A. L. WILLIAMS and
N. H. LOOMIS,
Solicitors for the Union Pacific Railway Company.

Indorsed.—No. 6886. The United States vs. The U. P. Ry. Co. et al. Stipulation. Filed Jany. 13, 1893. Geo. F. Sharitt, Clerk.

34 In the Circuit Court of the United States for the District of Kansas, First Division.

REPLICATION OF THE UNITED STATES THE ABOVE NAMED COMPLAINANT, TO THE ANSWER OF SAID DEFENDANT, WILLIAM HOARD.

The United States, Complainant,
No. 6886. vs.
The Union Pacific Railway Company et al., Defendants.

This repliant, saving and reserving to itself now and at all times hereafter all and all manner of benefits and advantage of exception which may be had and taken to the manifold insufficiencies of the said answer, for replication thereto says that it will aver, maintain and prove its bill of complaint to be true, certain and sufficient in the law to be answered unto; and that said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by repliant without this; that any other matter or thing whatsoever, in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things the repliant is and will be ready to aver, maintain and prove, as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

J. W. ADY,
P. L. SOPER,
Solicitors for Complainant.

Indorsed.—No. 6886. In Circuit Court of U. S. Dist. of Kansas. The U. S. vs. Union Pacific Ry. Co., et al. Replication. Leave given to fill as in time, John A. Riner, Judge. Filed Apl. 17, 1893. Geo. F. Sharitt, Clerk.

35 United States, Complainant,
No. 6886. vs.
The Union Pacific Railway Company et al., Defendants.

ORDER.

For good cause shown it is hereby ordered that the time for taking testimony in the above entitled cause be, and is hereby extended until the first Monday in June, 1893.

JOHN A. RINER, Judge.

Indorsed.—No. 6886. Order extending time to take testimony. Filed Apl. 7, 1893. Geo. F. Sharitt, Clerk.

36 In the Circuit Court of the United States for the District of Kansas.

The United States of America, Complainant,
vs.
The Union Pacific Railway Co., Henry Gay, M. J. Wellslager, and Wm. Hoard, Defendants.

Depositions of witnesses produced, sworn and examined on the 31st day of May, 1893, between the hours of nine o'clock A. M. and six o'clock P. M. of that day at the United States Land Office in the City of Salina, Saline County, Kansas, before me, H. B. Wallace, a notary public within and for the said county and State, in a certain cause now pending in the Circuit Court of the United States for the District of Kansas between the United States, complainant, and the Union Pacific Railway Co., Henry Gay, M. J. Wellslager and Wm. Hoard, defendants, on the part of the complainant.

Present: D. R. Wagstaff for complainant; and Garver & Bond for the defendants.

37 In the Circuit Court of the United States for the District of Kansas.

The United States of America, Complainant,
vs.
The Union Pacific Railway Co., Henry Gay, M. J. Wellslager and Wm. Hoard, Defendants.

State of Kansas,
District of Kansas, County of Saline—ss.

I hereby certify, that on the 31st day of May, 1893, before me, H. B. Wallace, a notary public in and for the County of Saline and State of Kansas, personally appeared at the United States Land Office in the city of Salina, Saline County, Kan-

sas, pursuant to the notice hereto annexed, between the hours of nine o'clock a. m. and six o'clock p. m. of said day, the witnesses named in said notice, D. R. Wagstaff, Esq., appearing for the complainant, and Garver & Bond appearing for the defendants, and the said J. G. Mohler, D. R. Wagstaff and S. S. Godfrey, being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said, as appears by the depositions hereto annexed. And I further certify, that the said depositions were reduced to writing by me, and were, after they had been reduced to writing, subscribed by said witnesses, and the same has been retained by me for the purpose of sealing up and directing the same to the Clerk of said court, as required by law.

And I further certify, that the reason why the said depositions were taken, was, that the said witnesses reside at and near the city of Salina, Saline County, Kansas, and more than 100 miles from Topeka, Kan. the place where this cause is to be tried.

And I further certify, that I am not counsel or attorney to either of the parties, nor am I interested in the event of the cause.

38 And I further certify that the fee for taking said depositions $10.00 has not been paid by either party, and the same is just and reasonable, and due and is claimed by me.

In testimony whereof, I have hereunto set my hand and official seal at the city of Salina, Saline County, Kansas, this the 31st day of May, A. D. 1893.

[Seal]

H. B. WALLACE, Notary Public.

Com. expires Nov. 10th, 1894.

39 United States of America,
District of————ss.

In the Circuit Court of the United States for the District of————.

The United States of America, Compt.,
vs.
The Union Pacific Railway Co., Henry Gay, M. J. Wellslager & Wm. Hoard, Defts.

You, the above named Wm. Hoard, Henry Gay & M. J. Wellslager and your solicitor of record, are hereby notified that on Wednesday the 31st day of May, A. D. 1893, the above named complainant will, in the above entitled suit, at the office of H. B. Wallace, notary public, at the United States Land

Office in the County of Saline, in the city of Salina, Kansas, take depositions of J. G. Mohler, C. W. Banks, D. R. Wagstaff and S. S. Godfrey to be used as evidence on the trial of said suit, and on the hearing of each and every motion and application therein.

And that the taking of said depositions will commence at 9 o'clock a. m. of said day, and that the taking of the same will be adjourned and continued from day to day, Sundays excepted, at the same place, until the taking of the same is completed. The reason for taking the evidence of the said J. G. Mohler, C. W. Banks, D. R. Wagstaff and S. S. Godfrey by deposition is that each of said named persons live more than 100 miles from the place of trial of this action.

Dated this 23rd day of May, A. D. 1893.

J. W. ADY, For Compt.

This notice was served on us this 23rd day of May, A. D. 1893, by delivery of a duplicate of the same to Garver & Bond Attorney for Wm. Hoard.

40 JEREMIAH G. MOHLER, being first duly sworn on his oath, deposes and says that my name is Jeremiah G. Mohler I usually sign my name J. G. Mohler. I was a soldier in the war of the Rebellion and was mustered out at Nashville Tenn., June 26th, 1865, as Captain of Company "A", 115 Ohio Vol. infantry by expiration of term of service I have lived at Salina, Kansas, since Oct., 1869. Some time in July, Aug., or in early part of Sept., 1871, after the Secretary of the Interior rendered his decision in the case of Boyd vs. the Burlington and Mo. River R. R. Co., I appeared at the United States Land Office and made a written application to homestead the N. E. ¼ sec. one (1), township fifteen (15), S of range three (3) west, the same being the land in controversy I tendered to the register and receiver the proper fees being $14.00. My application was rejected by the register and receiver, they indorsing on back of it that fact over their official signatures from that decision of the register and receiver I prosecuted an appeal to the commissioner of the general land office by whom the decision of the register and receiver was reversed, and I was permitted to make my entry which I did on the 29th of Sept., 1871, paying the homestead fees of $14.00 a copy of commissioners letter Sept. 14th, 1871, hereto attached and made a part of this deposition marked "A." After making my entry I went out to the land and drove all over it and found it a raw piece of prairie no one living upon it. On one portion of it I found a piece of ground indicated that there had been some improvement there some time. I was making arrangements to establish my home on the tract in six months as the

law gave me when some time in Dec., 1871, I was served with a notice of contest from the United States Land Office at Salina entitled K. P. R. R. Co. vs. J. G. Mohler and Charles Elder in which notice the date of hearing was set for Jany 15th, 1872. Prior to that time my intention was called
41 to letter "G" of commissioner of general land office of date of Oct. 23rd, 1871, by which the commissioner cancelled D. S. No. 3970, of Charles Elder made June 21, 1866, on the N. E. ¼ of sec. 1-15-3-W. among a large number of others and directed the local officers to make proper notes on the records, said letter of Oct. 23, 1871, stating that said cancellations was made pursuant to hearing had on application of K. P. R. R. Co., to cancel said entries and award them the land made to the Junction City land office which then had jurisdiction of said lands, the contest case was not tried on the 15th of Jany, 1872,—my recollection was that it was continued to May, 1872, and I think was dropped; at the time of the first contest the commissioner letter of Nov. 1st, 1871, directing hearings and fixing burden of proof was on file in the office and the first contest was instituted under that letter a copy of which is hereto attached marked Exhibit "B" and made a part of this deposition. A new contest was instituted against me individually I never moved upon the land because of the various rulings and cancellations and contests—I was born on 20th day of Dec., 1843, in Stark County, Ohio, I have never made any other homestead entry and have never taken or had any Government land under the homestead laws of the United States except this N. E. ¼ of sec. 1, Tp. 15, s. R. 3.W. This land was patented to the K. P. R. W. Co., on Sept. 10th, 1874, per list No. 5. On the 28th of July, 1885, I made application at the United States Land Office at Salina, Kas. for the reinstatement of my homestead entry No. 11537 which was rejected by the local officers and which rejection I appealed to the general land office, I also on the said 28th day of July, 1885, after the rejection of my application to reinstate my H. E. No. 11537—made application at the United States Land office at Salina, Kas. to purchase this N. E. ¼ sec. one Tp. 15, S R. 3. W. under the 2nd sec. of act of June 15th, 1880, tender-
42 ing to the register and receiver the money therefor this application was also rejected and I also appealed from it to the general land office. I also on the same day after the rejection of my application to purchase made application to make a new homestead entry for the land and tendered the fees therefor. A copy of the letter of the register of the land office at Salina, Kansas, of date July 28th, 1885, transmitting my appeals to commissioner, is hereto attached marked Exhibit "C" and made a part of this deposition. I prosecuted these appeals to the end.

Counsel for William Hoard objects to so much of the above evidence as refers to the proceeding taken by J. G. Mohler in the United States Land Office with reference to this land for the reason it is irrelevant to any issue in the case and moves that same be excluded and he also objects to the testimony given with reference to appeals and proceedings had in the United States Land Office outside of the Salina office for the reason that there is a record of such matters which is the best evidence. The above objections are made at this time as the evidence was given in a narrative form without opportunity to object before it was given.

Cross-Examination

By T. F. Garver, Atty. for William Hoard:

Q. Is this letter of May 15th, 1873, from W. W. Curtis, acting commissioner of general land office the one which transmitted the decision of the coms in your contest case?

A. I do not know but suppose so.

(A copy of letter is hereto attached marked Exhibit "D" and made a part of this deposition.)

Q. What was your business when you came to Salina in 1869, and what has it been since then?

A. [Practising] law.

Q. Where were you living in Sept., 1871?

A. I was living on the same lot where I am now and where I have been living since 1871.

43 Q. You owned that property then?

A. I think I did. One lot of it.

Q. What signs of improvements did you see on this land when you went over it as stated in your direct examination?

A. Nothing but what seemed the remains of some house or dug out.

Q. Was there nothing else on the land at that time indicating the previous presence of other persons?

A. My recollection is not distinct, there might have been a hedge row broken or some broken land but there were no habitation there.

Q. What particular thing did you do after making your entry on this land with a view of settling upon it?

A. I was planning to put up a house sufficient to live in on the land before I got my plans consummated Elder's entry was cancelled and contest was instituted against my entry and since then I have never felt that I dared risk spending any money for improvements on the land considering the condition the title was in.

Counsel for Hoard moves to strike out as not being not responsive to the question.

Q. In speaking of your arranging or planning, do you mean that all of this planning was in your mind?

A. No sir.

Q. What specific thing did you do in that direction?

A. I drew a rough plan of a house and submitted it to carpenters to find out how much lumber it would take and what it would cost to build it.

Q. You spoke of the continuance of the first contest have you examined the records of the land office at Salina with reference to that contest?

A. I have examined some of the records.

Q. The records shows that the hearing of that con-
44 test was set for Jany. 15th, 1872, is there any entry or memoranda of any continuance or any other action taken in that case?

A. I have seen no records of that kind.

Q. Have you not examined the contest record and is it not a fact that that record contains no entry of anything being done in that case after Jany. 15th, 1872?

A. I have examined the record and the records shows nothing but the title of the case and the hearing was ordered by the Gen. commissioner, case set for Jany. 15, 1872, and says, see Contest No. 3760, which is the number of the subsequent contest, the title which is K. P. R. R. Co. vs. J. G. Mohler.

Q. Was the fee which you paid when you made your homestead entry repaid to you?

A. I can not answer this question truthfully, directly I will state the circumstances. Some considerable time after this land was patented to the K. P. R. R. Co., by the Government of the United States, Mr. L. G. Skancke who had been connected with the land office as clerk came to me one day and suggested as the land had been patented he could get my fee back, informing me that the R. R. Co. had received a patent for the land and I might as well have the money as the Government. I gave him permission to get it back for me and I presume he did, he gave me $5.00 and retained $9.00 for his services. Mr. Skancke at the time was or had been in the employ of the K. P. R. R. Co., contesting settler's claim to lands within the limits of the grant to the R. R. Co.

Q. He did not pretend to be acting for the R. R. Co. in getting this money back for you, did he?

A. I think not.

Q. About what year was that?

A. It is imposible for me to state that, all that I now recolect is that it was subsequent to the issuing of the
45 patent, that is my best recollection, I can not state within five years. I dont know that it was previous to 1880.

Re-Examined.

I have ever since 1871 laid claim to this tract of land under my homestead entry and have never voluntarily abandoned my claim.

Counsel for Wm. Hoard objects to the evidence last above given and moves its exclusion, for the reason that it states conclusions only without facts.

J. G. MOHLER.

Subscribed and sworn to before me this 31st day of May, 1893.

[Seal] H. B. WALLACE,

Com. Ex. Nov. 10/94. Notary Public.

D. R. WAGSTAFF, being duly sworn deposes and says: My name is Daniel R. Wagstaff, I live at Salina, Kansas, have lived here since June, 1865, I knew Charles Elder who filed a declaratory statement No. 3970 on N. E. ¼ Sec. 1, township 15, south range 3 west.

Q. You may state how intimately you were acquainted with Charles Elder during the year 1866 and what you knew with reference to his occupation, place of residence and home?

Counsel for Wm. Hoard object to this question as irrelevant and immaterial and for the further reason that the relation of Charles Elder to this land was passed upon and determined in proceedings properly had by the land department.

A. I knew Charles Elder in the army, was well acquainted with him while he lived here; he shaved me two or three times a week during the spring and summer of 1866; his barber shop was on the lot where the Daily Block in this city now stands, he used a tent for a shop. He claimed a residence on the land in controversy and I loaned him my horse frequently during that time to ride out there and back; I have seen him riding out in that direction in the evening and returning in the
46 morning—I have no recollection of ever seeing him on the land.

Q. Did you during the year 1866 see any improvements on this land?

Objected to for the reason above given.

A. I don't remember passing over the place during that year; I saw what appeared to have been an old dug out on the land in 1867 and 1868, and I think some trace of it as late as 1870 and 1871, when I used to pass over the land shooting chickens; I never seen the lines and don't know positively that

it was on this land; but it was on the land known as the Elder claim in 1867.

Q. When, if you know, did Elder leave this section of country?

Objected to as above.

A. My recollection is that he went away from here at the time of the erection of the U. P. Road in the spring of 1867—I should think in May or June, 1867.

Cross-Examined.

Q. What did you see on the land, which you designate as the remnants of a dug out in 1867 and 1868?

A. A square hole in the ground, probably from 10 to 12 feet one way and 8 or 9 feet the other, it was about 2 feet deep in the center when I first saw it, and sloped in or caved in at the sides—I think when I first saw it there was a cottonwood post on one of the corners, and the last time I was there, I think that post had grown into a tree.

Q. How far was that place from Salina in 1866?

A. I should think it was from 4 to 5 miles from where the barber shop was, to where the dug out stood.

Q. Of your own knowledge, you don't know where he went with your horse at the times he borrowed him, do you?

A. I do not, except the direction.

Q. You are interesting yourself in this case as at-
47 torney for J. G. Mohler, are you not?

A. Mohler asked me to assist him in the taking of depositions in this case, which I have been doing.

Re-direct.

At the time the case of the Railway Co. vs. Mohler to secure the cancellation of his homestead entry was tried, Mohler requested me to testify as a witness in the case; I was at the time Receiver of Public Moneys in the U. S. Land Office and on that account refused to testify as a witness.

The above objected to as irrelevant and immaterial by counsel for Wm. Hoard.

D. R. WAGSTAFF.

Subscribed and sworn to before me this 31st day of May, 1893.

[Seal] H. B. WALLACE,
Notary Public.

Com. Ex. Nov. 10th, 1894.

48 SANFORD S. GODFREY, being first duly sworn deposes and says that my name is Sanford S. Godfrey.

Q. State your name?
A. S. S. Godfrey.
Q. Where do you live?
A. Salina, Kans.
Q. How long have you lived in Saline County, Kansas?
A. Since July, 1866—I first came to Saline County, Kansas in April, 1866, I am acquainted with the N. E. $\frac{1}{4}$ of sec. 1, Tp. 15 S range 3 W. I have known this land since some time in April, 1866. I have been on this tract of land.
Q. When to your recollection were you first on this tract of land?
A. In the latter part of April, 1866.
Q. When were you next on this tract of land?
A. About the 19th of July, 1866.
Q. What were you doing on this land about the 19th of July, 1866?
A. I was there in company of R. S. Champlin and Patrick McDivett.
Q. Was any other person there on that land at that time?

Objected to by counsel of Wm. Hoard as being immaterial and so far as Charles Elder is concerned the proper tribunal of the land department has heard and decided as to his relation to this land.

A. Yes sir.
Q. Who?

Objected as last above.

A. Charles Elder.
Counsel for William Hoard moves to exclude the last answer for the reason above given.
Q. What was Charles Elder doing there?

Objected to as above.

49 A. He was stopping there on that claim.
Q. How was he stopping there what do you mean?

Objected to as above.

A. He had a place he was stopping in what we used to call a dug out the south part was of lumber.

Objected to as above.

Q. Do you know where Charles Elder made his home at that time?

Objected to as above.

A. That night he was on this place and claimed it as his home.

Counsel for Hoard moves to exclude the answer what Elder said as being incompetent and irrelevant.

Q. How late did you remain there that night?

Objected to as above.

A. About half past 10.

Q. Were you in that dug out during that time?

Objected to as above.

A. I was.

Q. State what if any thing was in that dug out that night other than the persons [who] have mentioned?

Objected to as above.

A. There was two boards fixed for a table and a bunk and two or three pair of Government blankets two or three blocks and a dry goods box and a big satchel hung up on inside.

Q. When you left that night you may state where you left Elder?

A. I left him at the dug out. I saw him Charles Elder on this land in latter part of April, 1866.

Cross-Examination

By T. F. Garver, Atty. for William Hoard:

Q. Where did you live after coming to this county in July, 1866?

50 A. I lived in Steel's house two miles south and 40 rods east on the bank of the Smoky Hill River the place now owned and occupied by Wm. Muir. I lived there from the morning of the 17th day of July, 1866, to Dec. 5th, 1866.

Q. Where have you resided since then?

A. From the 5th day of Dec., 1866, I resided on the S. W. $\frac{1}{4}$ sec. 20 15-2. W. to about 7 years ago when I moved to Salina.

Q. On what part of N. E. $\frac{1}{4}$ of 1-15-3, was this dug out which you saw Elder in, in July, 1866?

A. In the N. E. $\frac{1}{4}$ part.

Q. How near to the east line?

A. I would think it was about 20 rods.

Q. How far from the north line?

A. I would think about 15 rods from the north line.

Q. Was there a road or traveled way on the north and east line of this section?

A. I do not think there was any on the north there was on the east.

Q. Could this dug out be seen from the road?

A. Yes sir.

Q. Was there any evidence of any thing else having been done on the land?

A. I saw a post set in front.

Q. How large was that dug out?

A. I would judge it was 12x14.

Q. How deep was it dug into the ground?

A. About 2 feet or 2½ feet.

Q. What was the character of the ground as to being level where this dug out was?

A. It was level or nearly so, as the whole quarter was.

Q. How was the dug out constructed?

51 A. A post set in in each corner in front of it boarded up with lumber from dry goods boxes, and the sod was laid up on the outside and dirt banked against it. The roof consisted of willows and blue grass and dirt roof. I judge it was about 5½ feet high inside. It was higher in center than on sides it was about 6 feet in center.

Q. How long did that dug out stand there to your knowledge?

A. In the spring of 1867 is the last time I remember of seeing it there, then one side of it had fallen in.

Q. Were there any trees or other things to obstruct the view of that dug out from the road or any other point on the land?

A. None at all—all prairie.

S. S. GODFREY,

Subscribed and sworn to before me this 31st day of May, 1893.

[Seal] H. B. WALLACE, Notary Public.

Com. ex. Nov. 10, 1894.

52 EXHIBIT "A."

108 & 97 W. Kiel.

Department of he Interior, General Land Office,
Washington, D. C. Sept. 14th, 1871.

Register and Receiver, Salina, Kansas.

Gentlemen:—I have received yours of the 24th June last, 7th July, and 5th ult., transmitting a number of applications to homestead and pre-emption, certain tracts of land which applications were rejected by the Register for the reasons that the tracts are within the withdrawals for railroad purposes.

I have examined these several cases and find that the lands embraced in the following applications to-wit:

J. G. Mohler, N. W. ¼ 1-15-3 W.
Wm. H. Gilmore, N. E. ¼ 1-15-3 W.

* * * * * *

were withdrawn for the Kansas Pacific Railroad June 20, 1867, as per our letter of June 14, 1867, that at the date of the withdrawal there existed thereon unexpired pre-emption claims which had inception prior to, the date of withdrawal.

Hence, under the decision of the department in the case of S. M. Boyd vs. Burlington & Missouri Railroad and other similar cases these lands form no part of the grant and upon abandonment or cancellation of the pre-emption filings the lands are again open to pre-emption or honest entry.

Be pleased to notify the parties of the decision herein and permit those to perfect their respective entries who are so entitled.

Very respectfully,

W. W. CURTIS,
Acting Commissioner.

53 United States Land Office,

Salina, Kansas, June 3, 1893.

We hereby certify that the foregoing is a true and complete copy and transcript of so much of a letter addressed to the Register and Receiver of this office by the Commissioner of the General Land Office, Washington, D. C., dated Sept. 14th, 1871, now on file in this office as relates or refers to the N. E. ¼ Sec. 1, Tp. 15, S range 3 west 6 P. M. in Kansas.

J. M. HODGE, Register,
C. W. BANKS, Receiver.

54 EXHIBIT "B."

W. K. M. Pacific Railroad.

Department of the Interior, General Land Office,

Washington, D. C., November 1st, 1871.

Vol. 1, page 507.

Register and Receiver, Salina, Kansas.

Gentlemen:—By the terms of the several grants of lands for railroad purposes in the State of Kansas lands to which a pre-emption or homestead claim had attached at the time the rail-

road company had acquired its right are excepted from the grant and as you are aware the department has ruled that where such pre-emption or homestead claim has been or shall be subsequently abandoned the land reverts to the Government, and not to the railroad. A pre-emption filing of record on your books constitute of course prima facie evidence of a pre-emption right, but it has been represented that in many cases these filings have been made without the preliminary settlement required by the pre-emption laws, that such filings do not in such cases constitute a pre-emption right, that such right can only exist where the party has a legal status, which he does not have except by actual settlement prior to filing and that such illegal filings can not defect the railroad claim. Where the companies can establish the illegality of the filing or in other words that fraud in the inception of the pre-emption claim renders it absolutely null and void and that it does not therefore affect the right of the railroad.

I have carefully considered these propositions and have reached the conclusion that a filing made with allegation of previous settlement, but where it can be clearly shown that such settlement was not in fact made, is a filing in derogation of law and is fraudulent consequently is not a pre-emption right recognized by the law and does not withdraw the land from the right of the road.

Therefore where applications have been or shall hereafter be made to enter any such lands, you will order hearings giving due notice of the time of hearing to the applicant, the original pre-emptor and the railroad company; when the company will have the opportunity to prove the fraudulent character of the filing.

You will also in cases where the question is one between the original pre-emptor and the company direct a similar hearing. The proof in all cases must be confined to the action of the pre-emptor prior to the filing, as if the filing was legal in its inception it withdraws the land from the grant. Referring then to my letters to you of September 14th, 20th and 25th, allowing entries of these lands, you will notify the parties of this decision and that their entries will be suspended until hearings in each case can be had as herein directed. You will then order hearings giving notice to the parties as herein required and thereafter transmit the testimony with your joint opinion thereon, to this office for our action.

There are other points on which a filing may be shown to have had illegal inception, as for instance, where the party was a foreigner at the time or had previously enjoyed the right of pre-emption and you will admit the consideration of these

points where they may be alleged against the pre-emption claim.

Very respectfully,

WILLIS DRUMMOND,
Commissioner.

56 United States Land Office,

Salina, Kansas, June 3, 1893.

We hereby certify that the foregoing is a true and complete copy and transcript of a letter addressed to the register and receiver of this office by the Commissioner of the General Land Office, Washington, D. C., dated November 1st, 1871, now on file in this office.

J. M. HODGE, Register.
C. W. BANKS, Receiver.

57 EXHIBIT "C."

Salina, Kansas, July 28th, 1885.

Hon. Wm. A. J. Sparks, Com. Gen. Land Office.

Sir:—I have the honor to transmit herewith the application of J. G. Mohler to have his H. E. 11537 for the N. E. ¼ sec. 1, Tp. 15, S R 3 W. reinstated the same having been cancelled Sept. 9th, 1873, rejected by the register and receiver at 9 o'clock a. m. this date for the reason that the tract of land described is patented to the Kansas Pacific Railway Co. also Mr. Mohler's appeal from our rejection.

I also enclose J. G. Mohler's application to purchase the tract of land above described under the 2nd section of the Act of Congress approved June 15th, 1880, presented at 11 o'clock a. m. this date and rejected by the register and receiver for reasons above stated, together with Mr. Mohler's appeal.

Also J. G. Mohler's application to make homestead entry of the above described tract of land presented at 3 o'clock p. m. this date and rejected for the reason above stated and Mr. Mohler's appeal to the Hon. Com. Gen. Land Office all of which is respectfully submitted,

J. M. HODGE, Register.

58 United States Land Office,
Salina, Kansas, June 3, 1893.

We hereby certify that the foregoing is a true and correct copy of a letter addressed to the commissioner of the general land office at Washington, D. C., dated July 28th, 1885, as the same appears on page 291 of a letter press copy book used in copying letters and now in this office.

J. M. HODGE, Register.
C. W. BANKS, Receiver.

59 EXHIBIT "D."

Vol. 10, p. 205. N. J. B.

Department of the Interior,

General Land Office.

B C T. Washington D. C., May 15th, 1873.

Register and Receiver, Salina, Kansas.

Gentlemen:—I am in receipt of the testimony transmitted with your letter of the 7th of Jany. last in the case of the K. P. R. W. Co. vs. J. G. Mohler involving the right to the N. E. ¼ sec. 1 Tp. 15 R 3 W.

J. G. Mohler was allowed by instructions from this office dated Sept. 14th, 1871, to enter as a homestead the above described tract Sept. 29th, 1871.

The records and evidence transmitted by you show that Charles Elder filed declaratory statement 3970, for the tract in question June 21st, alleging settlement June 18th, 1866. That the filing was not preceded by personal settlement. That Elder never lived upon nor improved the land himself. That the tract was abandoned and that there was no valid claim existing thereto at the date of the withdrawal for the K. P. R. W. June 20th, 1867, or at the time the grant to said R. W. Co. became effective March 3, 1869. The land therefore inured to said grant.

The instructions allowing Mr. Mohler to enter the land were modified by my letter of April 20th, 1872, ordering the hearing where the invalidity of the prior claim of Elder was established. You are hereby instructed to hold for cancellation homestead entry 11537 by J. G. Mohler. You will notify the parties in interest of this action and allow sixty days for appeal.

Very respectfully,
W. W. CURTIS, Acting Commissioner.

60 United States Land Office,
Salina, Kansas, June 3, 1893.

We hereby certify that the foregoing is a true and complete copy and transcript of a letter addressed to the Register and Receiver of this office by the Commissioner of the General Land Office, Washington, D. C. dated May 15th, 1873, now on file in this office.

J. M. HODGE, Register,
C. W. BANKS, Receiver.

Indorsed.—No. 6886. Opened by request of T. F. Garver Atty. for Hoard Nov. 27, 1893. Geo. F. Sharitt, Clerk. Filed June 5, 1893.

In the Circuit Court of the United States for the District of Kansas.

61 NOTICE TO TAKE DEPOSITIONS IN U. S. COURTS.

United States of America,
District of Kansas—ss.

The United States of America, Complainant,

vs.

The Union Pacific Railway Co., Henry Gay, M. J. Wellslager and Wm. Hoard, Defendants.

You, the above named complainant and your attorney of record, are hereby notified that on Thursday the 1st day of June, A. D. 1893, the above named William Hoard, a defendant, will, in the above entitled suit, at the office of Garver & Bond, attorneys at law, in the city of Salina in the County of Saline in the State of Kansas take depositions of William Hoard, Henry Oltman, Dennis Sullivan, Jane Coburn, R. H. Dihle, R. H. Bishop, William Bishop, A. P. Hillman, John H. Smith, Ham Jukes, James Haskett, Chas. Haskett to be used as evidence on the trial of said suit, and on the hearing of each and every motion and application therein. And that the taking of said depositions will commence at nine o'clock a. m. of said day, and that the taking of the same will be adjourned and continued from day to day, Sundays excepted, at the same place, until the taking of the same is completed. Reason for taking, that said witnesses reside more than 100 miles from place of trial.

Dated this 23rd day of May, A. D. 1893.

GARVER & BOND,

Attorneys for William Hoard.

This notice was served on me this 27 day of May, A. D. 1893, by delivery of a duplicate of the same to me, U. S. Atty.

J. W. ADY, Sol. for Compt.

63 In the Circuit Court of the United States for the District of Kansas.

The United States of America, Complainant,
vs.
The Union Pacific Railway Co., Henry Gay, M. J. Wellslager and Wm. Hoard, Defendants.

Depositions of witnesses produced sworn and examined on the 1st day of June, A. D. 1893, between the hours of nine o'clock in the forenoon and six o'clock in the afternoon of that day at the office of Garver & Bond in the city of Salina, Saline County, Kansas, before me, Frank Y. Locke, a Notary Public, in a certain cause now pending in the Circuit Court of the United States for the District of Kansas, between the United States of America, complainant, and the Union Pacific Railway Co., Henry Gay, M. J. Wellslager, and Wm. Hoard, defendants, on the part of the defendants.

Present: J. G. Mohler, Esq., and D. R. Wagstaff, Esq., for complainant; and Garver & Bond for defendants.

HENRY OLTMAN, called on behalf of defendants herein, and residing at more than 100 miles from the place where this cause is to be tried being by me duly cautioned and sworn to testify the whole truth and being carefully examined, deposes and says, as follows:

Examination

By Mr. Garver:

Q. State your name, age and place of residence.

A. Henry Oltman; 60 years old; I live five miles south and one mile east from here.

Q. When did you first come to this county?

A. On the 12th day of May, 1859.

Q. When did you establish your residence in this county?

A. This has been my residence ever since that time.

64 Q. Where were you living in 1866?

A. On my place where I do now. I live now on north-half of N. W. Quarter of Sec. 8, and the south-half of S. W. of Sec. 5, in town 15, range 2, west in Walnut Tp., this county.

Q. Do you know, and did you then know, the northeast quarter of Sec. 1, township 15, range 3, where Wm. Hoard now lives?

A. Yes, sir.

Q. In the summer of 1866, how often were you on, or near, this Hoard land?

A. Well, nearly every day; often twice a day; my business then was hauling wood to town.

Q. Which way did you go from your place to town?

A. Very near as it does now; I went east of this land. I came first to where Mr. Jones lives now, and from there the road was not established as it is now, and from Mr. Jones' place we went triangularly across to where Hillman's place is now. I crossed a part of the Hoard place. I crossed the north-east part of the Hoard place.

Q. What, if any, improvements was there on this place in 1866?

A. I do not know of any; there was a little breaking done there but I dont recollect the year; it was done by Dennis Sullivan.

Q. If there had been a dug-out, or a building of any kind on that quarter, five or six feet high, in 1866, would you have seen it?

A. Yes, sir; sure I would.

Q. Were any of the lands in that neighborhood, away from the river, improved at that time?

A. There was a man named Bassett living on the quarter lying right east of this quarter. I don't recollect the year, that he came there.

Q. What improvement did Bassett first make on his place?

Objection by complainant for the reason that the evidence called for is incompetent, irrelevant and immaterial.

65 A. He put a dug-out upon it; it was about 12 x 14 I guess, and about three feet in the ground I guess, I have been in it several times; and with a dirt roof; with boards up in front. A few years afterwards he put a little frame building there and did some breaking.

Q. How near did Bassett's dug-out stand to the east line of Hoard's place?

Objection by complainant as incompetent, irrelevant and immaterial.

A. Not more than 5 or 6 rods.

Q. Was there at that time anything to show where the line between these two quarters was?

A. Of course, there was a stone set; but I dont believe at that time there was a road there as now; I dont think there was any road at that time.

Q. Was there anything on the quarter south of Hoard's land?

A. Yes.

Same objection by complainant.

Q. State what was there?

Same objection.

A. Mr. Champlain took that place, and he had a dug-out there at first.

Q. How was his dug-out made?

A. I believe his was about five feet deep, and about 14 x 16.

Q. About how high were these dug-outs of Bassett and Champlain?

Objection by complainant as incompetent, irrelevant and immaterial.

A. They were about four or five feet above level; any how the comb of the roof was six feet above the level.

Q. How does this land lie? I mean the Hoard quarter and the land around it.

Objection by complainant as to any land other than
66 the land in controversy, as above.

A. It was all level land.

Q. Was there, at that time, any timber or other thing to obstruct the view so as to prevent seeing what was going on, and what was being done on this Hoard land?

A. No, not a thing.

Q. Did you notice the Bassett and Champlain dug-outs when they were first made?

Objection by complainant as incompetent, irrelevant and immaterial.

A. Oh, yes.

Q. Were there many persons living in that neighborhood in 1866?

A. No, there was not.

Q. Did you ever see, or hear of a person by the name of Chas. Elder about that land?

A. No, I did not know the man; and did not know that he had anything to do with the land.

Q. Did Champlain live in his dug-out in 1866?

Same objection by complainant; incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. Do you know when he came there?

A. He commenced his dug-out about the middle of the summer.

Q. Did you, at any time, either in 1866 or after that, see anything on the Hoard place that had the appearance of having been a dug-out?

A. No, sir.

Cross-Examination

By Mr. Wagstaff:

Q. Did the most direct road from your place to Salina, in 1866, cross the Hoard place?

A. Yes, sir, a part of it.

67 Q. Was there any road, from Salina south, at that time, which ran as far south as your place, that ran as far west as the Hoard place?

A. Yes, sir, there was.

Q. Is it not a fact, that there [as] a well beaten road from your place to Salina, which was the regular traveled road from Salina south, and which ran by the Sharp, the Holtman, the Jones, or Graham and the Mosier places?

A. Not at that time, in 1866.

Q. And that [that] was the only regular traveled road from Salina south in 1866?

A. I think at that time the traveled road was where the McPherson railroad now is.

Q. In hauling wood from your place to Salina at that time, where did you drive, on what streets?

A. That road would come in about where Mr. Kennison lives now, about a mile or so out of town.

Q. In what part of town did you drive?

A. In the south part of town, back of what is now the Logan school house in the southwest part of town.

Q. Did you drive by the Sharp place?

A. No, I could not at that time; the road was not then opened.

Q. Do you know who built the dug-out which you say was on the Bassett place, and four or five [roads] from the line of the Hoard place?

A. Yes, I do; Bassett himself.

Q. Did any one help him?

A. Not that I know; help was not so very plenty those days.

Q. There was no such man as Charley Elder in this country at that time at all was there?

A. Not that I know of; there may be; no, not that I know of.

68 Q. There was no man by that name who helped Bassett build that dug-out?

A. I dont know, I never saw him there; I saw Bassett building it himself. It may have been he helped but I did not see him.

Q. Have you at any time been over all this land, in 1866, on the Hoard place?

A. Yes, sir, several times.

Q. Are you willing to state upon your oath that there was no improvement made upon that land during that year?

A. No, sir, not that I know of.

Q. (Repeated.)

A. Yes, sir, I am wil-ing to.

HENRY OLTMANS.

Subscribed and sworn to before me this 1st day of June, 1893.

[Seal] FRANK Y. LOCKE,
Notary Public.

69 JOHN H. SMITH, called on behalf of the defendants herein, and residing at more than 100 miles from the place where this cause is to be tried, being by me duly cautioned and sworn to testify the whole truth, and being carefully examined, deposes and says, as follows:

Direct Examination

By Mr. Garver:

Q. State your name, age, and residence?

A. John H. Smith; age 78, residence, Salina, Kansas.

Q. Where were you living in 1866?

A. I was living out on Smoky; the S. W. quarter of 5-15-2. I had two eighties; one in section 5 and one in section 6.

Q. On which side of the river did you then live?

A. I lived on the west side then, in a dug-out.

Q. When did you move there?

A. I moved there in the fall of '66; I think in the latter part of Sept., 1866.

Q. How long did you continue to live at that place?

A. I dont know that I can tell how long we lived there; the family lived there 12 or 14 years.

Q. Did you at that time know the tract of land that William Hoard is now living on, the N. E. of 1-15, 3?

A. I knew the land, I did not know the section or what quarter; but I passed right by it in going back and forth to town.

Q. Where did the road run with reference to this land which you then traveled?

A. I made the road myself; there was no regular road; I went diagonally from the corner of the Deitz place about two miles south of town to my place; the most direct route.

Q. Where did that road run with reference to the Hoard place?

A. I think it ran through between the northeast corner of what is now the Hoard place and the Martin place—

70 between where the school house now stands and the Martin place then; what is now the Hagler place. I

went probably 40 or 50 rods north of the N. E. corner of the Horde place.

Q. Was that a road that you made for your own convenience or was it a road generally used by the people along the river there?

A. It was a road made for my own convenience, but after I got it opened up so that people could go through, other people traveled upon it.

Q. Was there at that time any [any] traveled road on the east line of the Hoard place?

A. I dont know; but I dont think there was on the line where it now runs; I know that Holtman had a road that came across from where Jones lived; I think it came across cat-a-wampus.

Q. How [friquently] did you pass by there in the fall of 1866, and the following winter?

A. I dont know; I hauled wood to town and went back and forth.

Q. Were you by there every week?

A. I was back and forth; I suppose every week.

Q. Did you in 1866, see any improvements on that quarter; anything in the shape of a house or dug-out?

A. No, sir, I did not.

Q. If there had been a dug-out on that quarter in the north-east part of it which was five or six feet high, say from three to five feet above the ground, would you have seen it and known it?

A. I think I would.

Q. Did you at any time in 1866 see anybody about that place, or hear of any one living there?

A. I dont recollect of seeing any one or hearing of any one making any move about living there.

Q. Were you, about that time, on and over this tract?

71 A. I was out in the bottom there frequently, sometimes after my cattle out there. I dont recollect ever seeing anything there.

Q. Did you at that time, know or hear of a man by the [the] name of Chas. Elder?

A. Not that I know of; I dont recollect it.

Cross-Examination

By Mr. Wagstaff:

Q. Was there any regular traveled road from Salina south, that went as far south as your place at that time, 1866, except the one that ran between the Hugh Morrison place and the Crawford place to Crawford's south line, east on Crawford's south line to the Sharp place, and from there south by Ed Johnson's, Holtman, the Graham place then (now Jukes

place), the Coburn place, and the Mozier place? Was there any road regularly traveled at that time, except the one I have now described?

A. I dont think there was.

Q. That road, the one I have described, ran a half mile east of the east line of the Hoard place, did it not?

A. They used to travel along there, but I dont call that any regularly laid out road there.

Q. Is that road not a half-mile east of the east line of the Hoard place?

A. Yes, sir, to Coburn's.

Q. You did not commence breaking the road you made there until late in the fall of 1866?

A. No, I did not commence breaking my road through there until the next spring, the spring of 67; that was for my own convenience.

Q. Were you over this land the Hoard place, at any time during the spring and summer of 1866?

A. No, I was not here.

Q. A dug-out might have been built on that land, in July, 1866, have caved in, and been grown over with grass,
72 so you would not have seen it?

A. Well, I dont know about that; I know there was pretty big grass in there, but I never saw any dug-out there.

Q. I am asking you if it might not have occurred without your knowing it?

A. I never was around hunting for dug-outs; it might possibly.

Re-direct Exaination

By Mr. Garver:

Q. Did not a good deal of the travel, when you first moved out there, go for several miles south of town, along near where the McPherson railroad now runs?

Objection as leading by complainant.

A. No, I dont think there was any track then any where the railroad is now.

Q. Could you see plainly on to this Hoard land, from any route you took from where you lived in 1866 to Salina?

Objection by complainant as leading.

A. Oh, yes, I could see all over it.

Q. How did the land lie from the Hoard place east to the river?

A. It was kind of rolling towards the river; it was a kind of second bottom, and where we lived was down on the first bottom.

Q. Could an object four or five feet high, near the northeast corner of the Hoard place, be seen from almost any point between there and the river?

Objection as leading.

A. No, I dont think it could; I dont think it could be seen down to the river, there are so many points along there.

Q. Could it be seen from the way you usually traveled in the fall of 1866?

Same objection.

A. Yes, sir.

JOHN H. SMITH.

73 Subscribed and sworn to before me at the place, on the day and at the time in annexed notice specified.

[Seal] FRANK Y. LOCKE, Notary Public.
Com. expires June 29th, 1896.

74 DENNIS SULLIVAN, called on behalf of the defendants herein and residing at more than 100 miles from the place where this cause is to be tried, being by me duly cautioned and sworn to testify the whole truth, and being carefully examined, deposes and says:

Direct Examination

By Mr. Garver:

Q. State your name, age and residence?

A. Dennis Sullivan; my age is 72 years; I reside in Saline County, Kansas; I live on the N. W. of 17-15-2.

Q. How long have you lived at that place?

A. Well, I think about 12 years.

Q. Where did you live in 1866?

A. I lived in section 18, town 15, range 2, in this county, adjoining the piece of land I now live on.

Q. When did you begin living on section 18?

A. In 1865, as nearly as I can recollect.

Q. On which side of the Smoky River did you live?

A. On the west side.

Q. How far was that from Salina?

A. I believe it was somewhere nearly seven miles; between six and seven miles.

Q. Are you acquainted with the piece of land on which Wm. Hoard now lives, the N. E. of 1-15-3?

A. I have seen the land often.

Q. Did you at any time do any work on the land?

A. I broke five or seven acres on that piece of land.

Q. At what time?

A. Well, it must have been in the spring of 1868 or 1869 I could not say just which year.

Q. On what part of that quarter did you do that breaking?

A. It was on the northeast part of that place where I
75 did the breaking.

Q. About what was the shape of the piece which you broke?

A. It was nearly square.

Q. How near the east line did it extend?

A. I dont just know; at that time there was no traveled road along the east line, and it was hard to tell; but I broke pretty near to the north line.

Q. Had there been any work done on that place before you went there to break?

A. Not that I saw.

Q. Were you on that place, and near it, in 1866?

A. I traveled along by the place and through the place at different times, I was along the road as often as once or twice a week, and sometimes oftener. It was on our way to Salina.

Q. Did you see any improvements on the place in 1866, or any appearance of work done on it by any one?

A. No, sir I did not.

Q. In passing along there in 1866, did you pay any attention, to what was being done on the land in that vicinity?

A. No, I did not.

Q. Did you notice any improvements that were made in that neighborhood along about that time? What I mean is, if any one made improvements, if you saw it?

A. That might be, I dont recollect; now Champlain moved in there; Champlain moved there some time in 66 or 67—he had some little improvement; and I could not tell what year it was Mr. Bassett made his improvements there, somewhere about where Horde's house is there; it was a little dug-out there opposite Horde's house.

Q. How near was the Bassett dug-out to Horde's east line?

A. I dont think it was over 4 or 5 rods.

76 Q. If there had been a dug-out standing as much as three or four feet above the ground in the northeast part of Horde's place in 1866, would you have seen it?

A. I think if there had been a dug-out there that high in the spring of the year I would have seen it.

Q. Would you have seen it if there had been such a dug-out there in July, 1866?

Objection as leading by complainant.

A. Yes, sir.

Q. When you plowed on that place, did you do the work yourself?

A. Yes, sir, I did.

Q. In plowing there did you see any place where the sod had been broken, or dug up, as if for the foundation of a dug-out or something of that kind?

A. I did not.

Q. Was there any place on the ground that you plowed where the sod had been dug up for a space of as much as six or eight feet square?

A. I never saw it.

Q. Could there have been such a place there over which you plowed, without your noticing it?

A. Why, I think not.

Q. Were there any trees or posts, or anything of that kind, on that place at that time?

A. I did not see any, sir.

Q. For whom did you do the breaking?

A. I did it for Mr. Scholl.

Q. What did he have to do with the place?

A. Well, he said he was the agent for the place for his son-in-law, that is just the words he told me.

77 Motion to strike out that portion of the answer of the witness which relates to what School told him.

Q. What Mr. Scholl was it?

A. I dont know his given [anme]; he was a black-smith here; and was afterwards a county-commissioner.

Q. Did you, in 1866, ever hear of or see a man by the name of Chas. Elder?

A. Not to my recollection.

Q. How many persons lived in 1866, within a radius of three miles of the Horde place?

Objection by complainant, as incompetent, irrelevant and immaterial.

A. I think there was about eight families and bachelors out there, eight different families.

Q. Do you know who did the next work on that place after you did the breaking there?

Objection by complainant as incompetent, irrelevant and immaterial.

A. I could not tell without I did it; I could not tell who did.

Q. Did you break any more?

A. It appears to me I did break a little the second time; but I would not be sure of it.

Q. Who was the first person that lived on the land?

A. The person that built the first house on the land—his name was William Whittman.

Q. When was that?

A. I could not tell just what year; it must have been about 14 years ago, I dont remember; 13 or 14 years ago; some where along about that time.

Cross-Examination

By Mr. Wagstaff:

Q. Did you at any time in the year 1866, go over and
78 carefully examine the land in controversy?

A. No, I had no business to examine it.

Q. Did you at any time in 67 go over and carefully examine the Horde land?

A. No, I did not.

Q. Was it in the year 1868 or 69 that you did the breaking on the land?

A. I said it was in 69 or 70, as well as I could [reccollect.]

Q. In going from the place where you lived to Salina, in 1866, the road on which you traveled ran a half-mile east of the east line of the land in controversy, the Horde place, did it not?

A. No, sir, not that I recollect of. We sometimes went east of the Horde place and sometimes went through the Horde place.

Q. Was there any traveled road in 1866 which ran through the Horde place?

A. In 1866, you know as well as I do, there was no road; there were just tracks here and there.

Q. Is it not a fact that in 1866, the only regular traveled road from Salina south which went that far south, was the one that ran by the Holtman, Graham and the Mozier places? And which was one half mile east of the Horde place?

A. Well, we traveled that sometimes, and sometimes we traveled across the [prarie]. There was no regular road.

Q. You may give the names of the eight heads of families and bachelors who lived within three miles of the land in controversy, the Horde place, in 1866?

A. Mr. Flag, was one; Mr. Combs, Wm. Combs; Jno. Lane; Adam Weigle; Bellows, Steele, and Caldron; there is another family in there I dont know who they were; on the Jukes place.

Q. Where did Hiram Mozier live at that time?

A. I think he must have lived in town.

Q. Where did R. S. Champlin [lived]?

79 A. He lived this side of Jones'.

Q. R. S. Chamlin's land adjoined the land in controversy, the Horde place, did it not?

A. Yes, sir.

Q. Where did Mark Bassett and his brother live at that time?

A. I can not tell you sir, they did not live out there tho' I think they lived in town at a mill. I have heard of Mark Bassett having a claim out there, but never saw him out except at that mill.

Q. How near did Jos. Coburn live to that land?

A. Within a mile or mile and half.

Q. There never was a man by the name of Chas. Elder in this country, or on that land in the year 1866, was there?

A. I never knew him.

Q. There might have been a man of that name here, and on that land without your knowing it, in 1866, might there not?

A. Yes, of course he might have been there; I am only telling you what I know.

Re-direct Examination

By Mr. Garver:

Q. Could he have built a dug-out there and lived in it, the dug-out remaining for several months, in July, and afterwards, in 1866 without your knowing it?

A. I think not.

Q. What did you mean in answer to Mr. Wagstaff question, when you said he might have been on the land and you not know it?

A. Well, he might have been on there after night and I not know it.

Cross-Examination.

Q. Will you swear that Chas. Elder was not on the land in the day time in the year 1866?

80 A. I will not swear it at all.

Q. Will you swear that Chas. Elder did not live on and sleep on that land in the year 1866?

A. I could not swear that he did not do it.

his
Attest: Thos L. Bond. DENNIS x SULLIVAN
mark

Subscribed and sworn to before me on the day at the place and within the hours in the annexed notice specified,

FRANK Y. LOCKE,
[Seal] Notary Public.
Com. Expires June 29th, 1896.

81 A. C. HILLMAN, called on behalf of the defendants herein and residing at more than 100 miles from the place where this cause is to be tried, being by me duly cautioned and sworn to testify the whole truth and being carefully examined deposes and says:

Direct Examination

By Mr. Garver:

Q. State your name, age and residence?

A. A. C. Hillman, 60, Salina.

Q. Are you acquainted with Wm. Horde, one of the defendants in this case?

A. Yes, sir.

Q. Do you know where he lives?

A. Yes, sir.

Q. State the description of his land?

A. He lives on the N. E. quarter of section 1, town, 15, range 3.

Q. How long have you known that piece of land?

A. I first knew of it in 1868, in the spring, and have known it off and on since.

Q. How long have you been a resident of Saline County?

A. I have been a resident, proper, of Saline County since 1883.

Q. Were you over this piece of land in 1868?

Objection by complainant as leading.

A. Yes, sir.

Q. To what extent, and how did you happen to do so?

A. I was here looking at land; intending to purchase somewhere; I wanted to get the best and most favorably located section I could; I saw the north-east and the north-west quarters of sec. 1-15-3, and both quarters pleased me. I settled it in my mind that I would take one of those two quarters; and I then went over the two pieces and examined them very carefully; I was very much undecided which quarter to take; I could not see much difference in them; I gave my preference to the N. W. quarter because, I thought, the road running by it would be a more public and general road leading

82 into the country, than the other road. I bought the north-west quarter of that section. Another reason why I looked over the land very carefully, was, because I had a friend in Ill. whom I thought I would like to have locate a piece of land by the side of me; I examined the land all over, on both quarters so it seemed to me there was not a space ten foot square that I did not see; I walked and rode over it.

Q. How long were you here at that time?

A. I can not exactly state; I dont know whether a month or two I was here several weews.

Q. What was there on the N. E. quarter at that time?

A. Nothing but grass, that I saw.

Q. Was there any place on the quarter where the sod had been dug up, for a space of at least six or eight feet square?

A. I dont think there could have been.

Q. Did you at any place on that quarter, see any indications of an excavation or anything indicating that any one had done any work on the land?

A. I saw nothing of the kind; I did not think there was anything of the kind that had ever been done there.

Q. Do you know who afterwards bought this quarter from the railroad company?

Objection by the complainant as incompetent, irrelevant and immaterial.

A. Milo M. Powers.

Q. Who was the friend, that you had in mind when you were making the examination of this land?

Objection as incompetent, irrelevant and immaterial by the complainant.

A. Milo M. Powers.

Q. Did you have anything to do, and if so what, with
83 the purchase of this land by Milo M. Powers from the R. R. Company?

Same objection.

A. I wrote to Land Commissioner DeVero, for Mr. Powers.

Q. Who was DeVero, land com. of what?

Same objection: incompetent, irrelevant and immaterial.

A. I understood him to be the Land Com. of the Union Pac. R. R. which was then Kansas Pacific.

Q. Do you know of the fact of the purchase by Powers from the Railroad being made?

Same objection.

A. Yes, sir.

Q. When did he purchase?

Same objection.

A. Some time after I went home, it was in 1868.

Q. Where did you reside at that time?

A. Nashville, Ill.

Q. Where did Powers live at the time?

A. Nashville, Ill.

Q. Was Powers out here himself previous to the purchase?

Same objection.

A. No, sir, not that I know of.

Q. Did you know W. B. Sholl, who lived here in Salina about that time?

Same objection.

A. Yes, sir.

Q. What was his business here then?

Objection by complainant as incompetent, irrelevant and immaterial.

A. He was a black-smith.

Q. Did he afterwards hold any official position in this county?

Same objection.

A. I have heard so, I dont know. It most seems to me that he was county commissioner when I came here.

84 Q. Was Milo M. Powers related in any way to this Mr. Scholl?

Same objection.

A. He claimed the relationship of son-in-law.

Q. Do you know anything about the first breaking that was done upon this land?

Objection as incompetent, irrelevant and immaterial by the complainant.

A. Only what I have heard; I have heard there was breaking done; that is all.

Q. At that time you were here in '68, and up to the time when Mr. Powers purchased the land, had you heard anything about a person by the name of Chas. Elder having anything to do with this land?

Objection as incompetent, irrelevant and immaterial by complainant.

A. No, sir.

Cross-Examination

By Mr. Wagstaff:

Q. There was grass three or four feet high on a considerable portion of this land when you first saw it, was there not?

A. No, sir.

Q. How high was the grass?

A. I would say three or four inches.

Q. Not over that?

A. I guess not.

Q. Then the grass did not grow over three or four inches high on this land or any part of it?

A. While I was there, when I saw the land, I dont think the grass was over 3 or 4 inches high; I did some breaking around mine; it was in the spring, and the grass had not started much yet.

Q. You dont know anything about what was done
85 upon that land in 1866 or 1867, do you?

A. I know nothing about that land before 1868.

Q. Then for all you know Chas. Elder may have lived on that land in 1866?

A. He might for all I know.

Q. How long were you engaged in examining this particular tract of [of] land in '68?

A. I could not say; I crossed it several times in different directions on different days.

Q. Do you think you examined it so closely that you could testify knowingly as to the condition of each ten feet square of the land, as stated in your direct examination?

A. It seems to me that I did.

Q. How many days were you engaged in making that examination?

A. As I said, I passed over it time after time; I rode and walked over it.

Q. Do you think you examined it close enough to say you knew the condition of each ten ft. square?

A. As I said it would seem to me that I did.

Q. Will you swear that there never was a dug-out built upon that land before you saw it in 1868?

A. I dont think there could have been any built there.

Q. I am asking what you say to that positively?

A. I will swear positively that I dont think there could have been any there without my knowing it.

Q. Will you swear positively that there never was a dug-out built upon that land, and occupied as a residence by Chas. Elder before you knew the land, and between the years 1866 and 1868 inclusive?

A. I dont believe there was.

86 Q. (Repeated.)

A. I say this: I saw no sign whatever of anything of the sort, and that I dont believe there was; and that is as positive as I will be.

Q. (Repeated.)

A. I will say that I dont believe that there could have been any dug-out on that place whatever; or I would have seen some sign of it.

Q. (Repeated.)

A. Now, I dont want to dodge or anything of the kind; and want to state the facts as they are; I have answered that as positively as I feel I should answer; I cannot say positively "yes" or "no" as you seem to want; I have given it as I understand; I will say: I believe if any one swears there was a dug-out there on that place, in my opinion they are mistaken.

Q. (Repeated.)

A. I never knew Chas. Elder, did not know there was any such man in existence; nor dont know yet that there was. I never heard of him until the last 3 or 4 days.

Q. (Repeated.)

A. I cant answer that "yes" or "no"; for I dont know Chas. Elder, and dont know of his living or being on that place in any way shape or fashion.

Q. Cant you answer whether or not you can swear positively to that fact. As to Elder's residence on that land, or not?

Question objected to, because it has been already a number of times answered by the witness.

A. I have no knowledge of what took place previous to my examining the land.

Q. Then for all you know Chas. Elder may have been an actual settler on the land in controversy, the Horde
87 place, in 1866, may he not?

Objection by defendants for the reason the witness has already stated his knowledge and that counsel is trying to argue the case with the witness and not calling for any fact.

A. He may have lived there; but I saw no sign of it.

A. C. HILLMAN.

Subscribed and sworn to before me, on the day, at the place and between the hours in the annexed notice and certificate specified.

[Seal] FRANK Y. LOCKE, Notary Public.
Commission Expires: June 29th, 1896.

88 WILLIAM HOARD, called on behalf of the defendants herein, and residing more than 100 miles from the place where this cause is to be tried, being duly sworn to testify the whole truth, and being carefully cautioned and examined, deposes and says:

Direct Examination

By Mr. Garver:

Q. State your name, age and residence?

A. Wm. Hoard; age 46, N. E. quarter of 1-15-3 west.

Q. Are you a natural born citizen of the United States?

A. I am.

Q. How long have you lived on that land?

A. Since Sept. 1885.

Q. Where did you live before that?

A. I lived in the western part of this county; and had been a resident of this county since 79.

Q. What business have you been engaged in since coming to this county?

A. Farming.

Q. From whom did you purchase this land?

A. James Quinn.

Q. At what time?

A. It was in August, 1885.

Q. Did you have an abstract of the title furnished when you bought the land?

A. Yes, sir.

Q. You may look at that (paper handed witness) and state what that is?

A. This is the abstract of the place there as I understand it.

Q. Is this the abstract on which you made that purchase?

A. Yes, sir.

(A copy of the abstract identified is hereto attached as a part of this deposition and marked Exhibit "A.")

89 Q. What did you understand at that time with regard to the source of your title?

Objection by complainant as incompetent, irrelevant and immaterial.

A. That that abstract showed the way in which the land was obtained from the Government up to Quinn. And all that was then against the land.

Q. At the time you purchased, did you know anything about any claims to this land other than what was shown by this abstract?

A. No, sir.

Q. Did you know, or had you heard anything, about any filings or entries having been made for the land under either the pre-emption or homestead laws of the U. S.?

Objection by complainant as incompetent, irrelevant and immaterial.

A. No, sir.

Q. Did you at that time know, or had you heard anything of a filing claimed to have been made for the land by one Chas. Elder, or of any efforts of J. G. Mohler to get the land?

A. No, sir.

Q. Was there any one living upon the place when you bought it?

A. Yes, sir, James Quinn.

Q. What improvements were [then]?

A. There was a one-story house; three rooms; barn and small stable and orchard, and there was claimed to be 110 acres broken and under plow.

Q. How much did you pay for that place?

Objection by complainant as not the best evidence.

A. $5000.

Q. You may look at that paper (paper handed witness) and state what that is?

90 A. It is a warranty deed from Quinn to me.

Q. Have you any of the other deeds or the patent to the land?

A. No, sir, I have not. This is the only one I have of the deeds.

Q. When you bought this land what was your object in having this abstract of title?

Objection by complainant as incompetent, irrelevant and immaterial.

A. To know that there was a title from the Government down to the one from whom I bought.

Q. When did you first learn that there was any question with regard to this title?

A. It must have been about 1888 or 1889 I think. It might have been 1890 or along there, I know it was quite a while after I was on the place.

Q. What improvements have you on the place at this time?

Objection by complainant, as incompetent, irrelevant and immaterial.

A. I have a house; it is a two-story 24 x 26, there is a wing, 16 x 18 on the side; there is a stable, place is fenced; there is orchard upon it, well; wind-mill over it; hedge fence around the place. Wire fence running through the place east and west, about 60 rods from the north line. I have broken since I have been on the place about 20 acres of [prarie.]

Q. What ground was in [prarie] when you bought the place?

A. There was about 50 acres on the north side of the quarter in [prarie] at the time I bought it in a strip extending

across the quarter 60 rods wide except 7 or 8 acres broken out on the S. E. corner of the strip.

Q. Where did you break the additional 20 acres?

Objection, incompetent, irrelevant and immaterial.

A. I broke on the east end of the strip; about the
91 east half of this strip.

Q. About how wide, north and south, was the [prarie] at the east end of this strip, when you went there?

A. I should think 25 or 30 rods wide, to the corner of my orchard as it stands now.

Q. When did you break that?

A. I must have broken that in 1888 or 1889.

Q. In breaking that ground did you see any evidences of the sod having been previously disturbed at any places?

A. No, sir, only where the road which went across it; looked like a wagon road.

Q. Was there a wagon road there that had been recently traveled?

A. No, sir.

Q. If there had been, as lately as 1866, an [exc-vation] made on that place for a dug-out, two or two and one-half feet deep, and as large as eight or ten feet square, would you have noticed signs of it?

A. I think I would, yes, sir.

Q. What was the appearance of the surface of the ground where you broke?

A. Smooth and level as if it never had been disturbed.

Q. How much of a depression was there, where the old road crossed?

A. The sod was worn off of it, it looked as if there had been a good deal of travel; lo-ked as if they had a number of tracks; it must have been worn down 3 or 4 or 5 inches in places, worn down there.

Q. Do you know the value of real estate in that neighborhood?

A. Yes, sir.

Q. What is this place worth, with the improvements upon it?

A. Well, it ought to be worth $50 or $60 per acre
92 with the improvements upon it.

Q. How much of an orchard is there upon the place?

Objection, as incompetent, irrelevant and immaterial.

A. There is about 100 apple trees, and I think about 50 or 60 pear trees.

Q. How long did you know the place before you bought it?

Same objection.

A. Personally to be over it, I never was over it until the spring I bought it; but have known the place longer than that. I knew it when Wittman lived there. Jas. Quinn lived on the place before I went there.

Q. Did any one else live there?

Same objection.

A. William Wittman.

Q. Do you know who broke up the ground on the place before you went there?

Same objection.

A. I know by their telling me; not of my own knowledge.

Q. Do you know where Wm. Wittman and Jas. Quinn are now?

A. No, sir, I do not.

Q. Are they in this State?

A. No, sir, I dont think they are; I have heard they were not.

Q. When did you last hear from either of them or of them?

Objection, as incompetent, irrelevant and immaterial.

A. Quinn left here about two years after I bought the place; and I have not heard from him since; I think Wittman was here a couple of years later than Quinn; the last I knew of Wittman I think it was at Hope, Kansas.

It [—] understood that all testimony as to improvements, and the value of the same, and where the parties Quinn and Wittman are or may be, is objected to by complainant as in-
93 competent, irrelevant and immaterial.

Cross-Examination

By Mr. Wagstaff:

Q. In what land district, Government Land District is this land situated?

A. I do not know.

Q. Dont you know that it is the District of lands subject to entry at the U. S. Land Office, at Salina, Kan.?

A. I dont know it only as I have heard it lately.

Q. Dont you know at the time you purchased this land that there was a U. S. Land Office located in this city?

A. I dont know whether I did or not.

Q. Did you not, yesterday, see records in the U. S. Land Office at Salina, Kan., raising questions of title to this land?

Objection by defendants, as immaterial, and calling for an opinion of the witness as to legal effect of records.

A. I did not look at records, I heard you talking about them there.

Q. Did you before purchasing this land in 1885, examine the records of the U. S. Land Office in this city, or make inquiry at that office, to ascertain whether or not there was any adverse claim to the land of record, there or not.

Objection, immaterial, not cross-examination.

A. No, sir, I did not.

Q. Dont you now know that at the time you purchased this land in 1885, that Capt. Mohler, was asserting his claim to the land through the proper land department of the Government?

Same objection.

A. I suppose this is the case; I received notice from the Government.

WM. HOARD.

Subscribed and sworn to before me on the day, at the place and between the hours in the annexed notice specified.

[Seal] FRANK Y. LOCKE,
Notary Public.

Commission expires June 29th, 1896.

94 HAMILTON JUKES, called on behalf of the defendants herein, and residing at more than 100 miles from the place where this cause is to be tried, being by me duly cautioned and sworn to testify the truth the whole truth and nothing but the truth, and being carefully examined, deposes and says, as follows:

Direct Examination

By Mr. Garver:

Q. State your name, age and residence?

A. Hamilton Jukes, 36 years old, Smoky Hill, Tp. Saline County, Kansas; about three miles south of here.

Q. How long have you lived in that part of this county?

A. I came there in Dec. 1867.

Q. Are you acquainted with the N. E. Quarter of section 1-15-3 west, now occupied by Wm. Hoard?

A. Yes, sir.

Q. How far did you live from that land after you established your residence in this county in December, 1867?

A. Just one mile northeast of it.

Q. Did you notice the condition of this land during that winter and the following year?

A. Yes, sir, I herded over it backward and forward.

Q. How carefully did you notice the land with reference to what was upon it or had been done upon it?

A. I never noticed anything done upon it; until there was some breaking done upon it, I dont know who did the breaking.

Q. Was there after you knew the land, any signs of there having been a dug-out on this Hoard land?

A. No, sir, there was no sign of a dug-out.

Q. Was there any place on the land where there had been an excavation made, as large or larger than 8 x 10 or 10 x 12 feet?

A. No, sir.

Q. If there had been anything of that kind on that
95 quarter made there, say in 1866, would you have seen it, after you came there?

A. If there had been a dug-out there I would have seen it; or a hole of any kind there; I could not have helped but seen it.

Q. Was there any dug-out in the [vacinity] of this land?

Objection by complainant, as incompetent, irrelevant and immaterial.

A. Yes, sir, there was a dug-out.

Q. State where it was?

Same objection.

A. It was east of this place; it was, I should judge, ten or twelve [roads] from the east line of this Hoard place.

Q. About how far was that dug-out from the north line of this Hoard land?

Same objection.

A. I should judge 25 or 30 rods.

Q. What roads were there in 1867, in the [vacinity] of this land?

A. There was not any laid out roads there was nothing but angling roads across the [prarie]; they were not straight roads; they angled right across. There was a road across the north-east corner of Hoard's land, and then across the N. W. corner of section 6-15-2.

Q. Where did that road run with reference to the dug-out, which you have spoken of?

A. It left the dug-out to the west of the road.

Q. What direction did that road run?

A. A southeast course.

Q. Who, if any one, occupied that dug-out.

Objection, as incompetent, irrelevant and immaterial.

A. Bassett.

Q. Do you know what has become of Bassett?
A. He is dead.

96 Q. Did you know R. S. Champlain?
A. Yes, sir.
Q. Where did he live?

Same objection.

A. He lived south of the Hoard place on the adjoining quarter.
Q. What has become of him?
A. He is dead.
Q. When was this N. E. quarter of section 1, first occupied by any one living upon it?
A. It was 12 years ago by William Wittman.
Q. Was there any house on the land before that?
A. No, sir.

Cross-Examination

By Mr. Wagstaff:

Q. How far east of the Bassett dug-out described by you, did the road which you spoke of run?
A. It was 3 or 4 rods.
Q. If the dug-out was 8 or 10 or 10 or 12 rods east of the Hoard place, and the road 4 or 5 rods, or 2 or 3 rods east of the dug-out how could the road cross the Hoard land?
A. I claim the dug-out was 25 or 30 rods south of the Hoard land, and the road cut across. I was over that place I guess more than you.
Q. Is it not a fact, that at the time you came here, the only regularly traveled road from Salina south, that went as far as the Hoard place, ran between the Hugh Morrison and the Crawford place, to Crawford's south line; east on Crawford's south line to near the Sharp place, and south on that line past the places of Ed Johnson, Holtman, the Graham, or Jukes place, the Jos. Coburn place and the Mozier (now the Jones) place?
A. I did not say that was a regular traveled road, I said there was a road running across; I say that was not.

Q. Did you ever examine every square rod of that
97 land and if so when did you so examine it?
A. I have herded all over it; I have examined every square rod of that place; it was in 1868 and from that on.
Q. What was your object in examining it?
A. We were there herding, and would not kids be looking for a hole in the ground and everything? I was then between 11 and 12 years old.
Q. You never saw this land until the month of Dec., 1867?
A. I guess the first I saw it was Jan., 1868.

Q. Then for all you know Chas. Elder may have been an actual settler on that land in July, 1866, may he not?

A. If he went and stood right out on the [prarie], he might have been if there had been a house or dug-out there there would have been signs of it then.

Q. Will you swear that Chas. Elder was not an actual settler on that land in the month of July, 1866?

A. No, I will not, because I was not here.

Re-direct Examination

By Mr. Garver:

Q. Have you noticed with reference to excavations that have been made in the [prarie], where they are made one or two feet deep, as if for the foundation of a house, or dug-out, as to the length of time that such excavation can be detected by any one passing over the ground?

A. Yes, sir, on our own place I have and elsewhere.

Q. What effect does the lapse of time have upon such excavation?

A. I have noticed them for 20 years.

Q. To what extent were they visible then?

A. There would be a sag there, and there would be a different soil too.

Q. When you came there, was there anything to indicate the line between the different quarter sections there,
98 and especially the line between the Hoard place and the section east of it?

A. There was on the Bassett place, you could notice his line; he had broke some along there.

Q. Was that breaking done when you came there?

A. It was done the following spring after I came in Dec.

Q. Where was his breaking done?

A. Done along on the west side of his place, it was not right in the N. W. corner.

Q. Before that breaking was done, was there anything to indicate the line there?

A. No.

Re-direct Examination

By Mr. Wagstaff:

Q. Do you know who built the dug-out on the Bassett place?

A. No, sir.

HAM JUKES.

Subscribed and sworn to before me on the day, at the place and between the hours in the annexed notice specified.

[Seal] FRANK Y. LOCKE, Notary Public.

Com. Expires June 29th, 1896.

99 JAMES HASKETT, called on behalf of the defendants herein, and residing at more than 100 miles from the place where this cause is to be tried, being by me first duly sworn to testify the whole truth, and being carefully examined, deposes and says:

Direct Examination

By Mr. Garver:

Q. State your name, age and residence?

A. James Haskett; age 50; I reside in Saline County, Kansas; on the N. E. quarter of 26-14-3.

Q. How long have you lived at that place?

A. We moved on to that place in the spring of 1866, in April I think, and have lived there ever since that time.

Q. Are you acquainted with the N. E. quarter of 1-15-3 now occupied by Wm. Hoard?

A. I have traveled over that land often where he lives.

Q. How far is that from your place?

A. About two miles from the nearest corners of the lands.

Q. Did you notice that land, the Hoard place, in 1866?

A. I have been across it a good many times.

Q. Were you upon it during the summer, say in June and July, and in August, 1866?

A. I was on it, or very near to it. I think we used to pass right over it.

Q. Was there any road running from your neighborhood in that direction in 1866?

A. In 1866, there was nothing unless it would be a track; some times we followed a track and some times we did not. There was not travel enough for a road.

Q. Did any one make any improvements on the Hoard quarter in 1866?

A. No, sir. Not in the way of a house or breaking.

100 Q. What kind of houses did the settlers on land generally make at that time?

A. Some built above ground, but most were what was called dug-outs.

Q. Was there anything like a dug-out on this Hoard quarter in 1866?

A. If there was I never saw it.

Q. Could there have been one there for several months and you not have seen it?

A. No, sir.

Q. Were there any dug-outs along about that time in the neighborhood of this land?

Objection by complainant as incompetent, irrelevant and immaterial.

A. I dont remember of any at all.
Q. Did you [—] Mr. Champlain in his life time?
A. Yes, sir.
Q. What did he first live in upon his land?

Same objection.

A. I could not say.
Q. Do you know of a dug-out that was built on a piece of land lying east of the Hoard quarter?

Objection by complainant as leading, incompetent, irrelevant and immaterial.

A. I did not.
Q. Did you know, or hear of a person by the name of Chas. Elder, in 1866 or 1867?
A. No, sir.

Cross-Examination

By Mr. Wagstaff:

Q. Where did you live in the spring and summer of 1866?
A. I lived out there.
Q. How many times were you over his land, the Hoard place, during the spring and summer of 1866?
101 A. I could not tell you how many times.
Q. In going from your place to where you struck the river did you cut across the [prarie] or travel by the road one-half mile east of your place?
A. I cut across the [prarie]. I might have traveled the road some times.
Q. Was there any regularly traveled road from Salina south in 1866, that ran as far south as this place, except the one that ran by the Graham and Coburn places which was a half mile east of the east line of the Hoard place?
A. I dont think that I could answer that question.
Q. The land in controversy, the Hoard place, adjoins the Mark Basset and the Champlain place, does it not?
A. I think so.
Q. It is all smooth level land, is it not?
A. As far as I remember it is.
Q. At that time, 1866, the land was entirely devoid of timber, was it not?
A. Yes, sir.
Q. You would have been as likely to have seen a dug-out on the Bassett place or on the Champlain place, if they had been built that year, 1866, as you would one on the land in controversy would you not?

A. I dont think I would, for that was inhabited I think; at that day. I went mostly further west than the Bassett place, and it was all smooth [prarie] out there.

Q. You dont remember seeing a dug-out on either the Bassett or Champlain place that year, do you?

A. No, I dont know that I do.

Q. Will you swear that Chas. Elder did not make settlement on the land in controversy in the month of June or July, 1866?

A. I dont know, there was no improvements no the land.

102 Q. (Repeated.)

A. If he was there I never heard of him.

Q. Can you swear that he was not there, and did not make settlement on the land in controversy in the months of June or July, 1866?

A. He made no settlement there I think; at least I never saw any signs of any there.

Q. Will you swear positively, that Chas. Elder did not make settlement on the land in controversy—the Hoard place—during the month of June or July, 1866?

A. Yes, sir. That is, in the way of building a house.

Q. How can you swear to that so positively when you cant state whether or not dug-outs were built on the land immediately adjoining this land by Champlain and Bassett that year?

A. Because I passed over the place and did not see any.

Q. If there had been a dug-out built on the [prarie] on the Bassett place within 4 or 5 rods of the east line of the Hoard place, during that year, would you have seen it, the land being all smooth [prarie] between?

A. I might have seen it; I remember of a house about that time on the Bassett place.

Q. How near was that to the line of the Hoard place?

A. It was not but a few rods away.

Q. What kind was it?

A. Small frame house.

Q. What year was that?

A. I could not say exactly the year.

Q. Will you swear that there was not a dug-out built within five rods of the east line of that place in the year 1866?

A. No.

Q. How can you swear there was none built on the place, if you cannot swear to what was done within four or

103 five rods of the line, it being all smooth [prarie]?

A. Because I dont remember of any; I was over the place several times that summer.

Q. You are swearing there was none built on the Hoard place, because you dont remember of any being built there, are you not?

A. I am positive there was not.

Q. How many times were you over the Hoard place in '69?

A. I could not tell you.

Q. Were you over it at all that year?

A. I was not in that neighborhood as much that year as I was earlier.

Q. How many times were you over that place 1870 and '71?

A. I think as late as '71, we followed the roads more.

Q. Dont you remember how many times you was on that land during those years?

A. No, sir. For I was not in that neighborhood so often at that time.

Q. How many times were you over [than] land in 72, 73, 74, and 75, each year, how many times?

A. I could not tell you as to the dates.

Q. Was you over it at all in each of those years?

A. I dont know that I was over the land, I was in sight of it probably several times.

Q. How many times were you on and over this land in 1876?

A. I could not tell you as to dates.

Q. What improvements were made upon this land in '76?

A. I dont know.

Q. How many times were you over this land in 1886?

A. I dont know that I was on it at all that year.

Q. What improvements were made on the land that year?

A. I dont know; for then I did not go up there much in that neighborhood.

104 Q. You lived just as near to the land in 1876 and 1886 as you did in 1866, did you not?

A. Yes, sir.

Q. What improvements was made on the land in 1868?

A. I dont know just what was done upon it in that year.

Q. Not any that year, was there?

A. I could not say.

Q. What was done in 1867 upon that land?

A. I could not tell you that.

Q. What in 1869?

A. I dont know; for I dont know when the improvements were put there.

Q. How can you testify so positively as to what was done in '66 when you cant say what was done in any year since that year?

A. In the spring of '66 we settled out there; and it was the first summer that Dennis Sullivan lived on his place, and we used to go visiting back and forth so much that summer is the reason I remember so well about that year.

Q. Were you standing guard over that land day and night during the entire season and year of 1866?

A. No, sir.

Q. If you were not, how could you swear that Chas. Elder did not make pre-emption settlement on that land during that year?

A. Well, if he made what I would call a settlement, he would have built a house or dug-out or something that could be seen, and I did not see any that summer.

Q. Your testimony on that point then is based on your opinion, that in order to make a settlement it is necessary to build a house?

A. It would be some improvement [—] could be seen on the naked [prarie].

Defendants object as repetition, having been answered.

A. Not necessarily, for a settlement to start with I dont think; a foundation, suitable to build a house upon, I think would make a sufficient settlement.

Q. Will you swear that Chas. Elder did not make settlement on the land in controversy during June or July, 1866, by laying the foundation of a house, or otherwise?

A. No, I wont swear he did not, I will swear I did not see any.

Re-direct Examination

By Mr. Garver:

Q. Were there many settlers in your neighborhood and in the [vacinity] of the Hoard land in 1866?

A. I would say a few.

Q. Was Dennis Sullivan whom you have mentioned as visiting, an old acquaintance?

Objection, as incompetent, irrelevant and immaterial.

A. Not personally; my brother came to the State with him; I came from Ft. Riley, as they did here.

Q. Who first built a house and lived on this land?

A. I think it was Wittman, after that date I was not up there so often; I had more work at home.

Re-Cross

By Mr. Wagstaff:

Q. Are you acquainted with R. S. Champlain?

A. Yes, sir, slightly.

Q. His land adjoined the Hoard land on the south?

A. I think it did.

Q. Where did he live in summer and fall of 1866?

A. I met him in town more than at any other place.

Q. If you know where he lived, you may state where he lived during summer and fall of 66?

106 A. I think he—when he first came here I dont know just where he did live; I could not tell exactly.

Q. Are you acquainted with Mark Bassett?

A. I was acquainted with him some.

Q. Where did he live in summer and fall of 1866?

A. The first time I knew him—I dont know as I can tell where he lived then; I dont know as I was acquainted with him at that time.

Q. Are you acquainted with S. S. Godfrey?

A. Yes, sir.

Q. How long have you known him?

A. I cant say how long.

Q. Did you know him in 1866?

A. I could not say.

Q. Where was he living when you first knew him?

A. I dont know.

Q. Did he ever live in the neighborhood of this land?

A. He lived S. E. of it I think, the first I knew of his residence.

Q. Where was it; was it the Steele house in 1866?

A. It must have been later than that.

Q. Did you know a man [be] name of Peter McDivit?

A. I dont remember him.

JAS. HASKIT.

Subscribed and sworn to before me, on the day, at the place and within the hours in the annexed notice specified.

[Seal] FRANK Y. LOCKE,
Notary Public.

Com. expires, June 29th, 1896.

107 CHARLES HASKETT, called on behalf of defendants herein, and residing more than 100 miles from the place where this cause is to be tried, being duly cautioned and sworn to testify the whole truth, and being carefully examined, deposes and says:

Direct Examination

By Mr. Garver:

Q. State your name, age and residence?

A. Chas. Haskett; 63 years old; I reside in this county; Saline County, on the N. W. Quarter of 26-14-3.

Q. How long have you lived there?

A. Ever since the spring of 1866. I think we moved there in April, 1866.

Q. Were you living there during the rest of the year 66 and 67?

A. Yes, sir, I lived there ever since.

Q. Are you acquainted with Wm. Hoard?

A. Yes, sir.

Q. Do you know where he lives?

A. Yes, sir.

Q. Were you acquainted with the N. E. Quarter of 1-15-3 on which Mr. Hoard lives, in 1866?

A. Yes, sir, I have crossed there at different times in that year.

Q. How did you happen to be going across this land?

A. I used to haul wood back and forth there angling across this quarter from up the Smokey.

Q. Did any one have any improvements in the shape of a house or a dug-out on that land in that year, 1866?

A. I dont think they did; because I was acquainted with land until there was a house built there by Wittman; and was back and forth two or three times a year until he did build; and he built right on my old wagon trail nearly, and broke some, and I quit traveling over it, and have never been across it since.

Q. When did Wittman build upon it?

A. I think somewhere about 12 years ago, for I paid
108 no attention to when he built, but I know there was no improvements only some breaking until he did build.

Q. How often were you across that place in the year 1866, do you think?

A. I was across it probably every month in the year back and forth; I hauled wood down across it. I got wood from Dennis Sullivan and went diagonally across from my place to Sullivan's place.

Q. If there had been any dug-out or structure of any kind on that quarter, in 1866, standing 3 or 4 feet at least above the ground, would you have seen it?

A. Yes, I would; because I could not help but see it, in that year or in any year afterwards, up till Wittman built upon it.

Q. Were there persons living on many of the lands between your place and the river?

Objection, as incompetent, irrelevant and immaterial, by complainant.

A. No; there was but very few.

Q. Did you pay any attention to the coming in of new settlers or the making of any improvements?

A. Yes, if there was any improvements made, I generally knew it.

Q. To what extent did you notice those things?

A. Whenever there was improvements put up I noticed it, and when there was a new-comer came in I noticed it, and if he made any improvements I noticed it; but I could not now give the year or month when the different ones settled there.

Q. Did you ever hear of a man by the name of Chas. Elder, being in there and making any settlement on this land?

A. No, sir, I never did; I never heard the mans name mentioned.

Q. Are you acquainted with the value of real estate in the neighborhood of Hoard's land?

109 A. Not at the present time, I am not.

Cross-Examination

By Mr. Wagstaff:

Q. Where did R. S. Champlain live in the summer and fall of 1866?

A. I said I could not tell the year; I know where he lived when I first knew him.

Q. Where did Mark Bassett live in the summer and fall of 1866?

A. I did not put the dates down; I know where he lived about that time, but for certain whether it was that year, I dont know.

Q. Where did S. S. Godfrey live in the summer and fall of 1866?

A. I will not answer on that; I have my doubts if he was here or not.

Q. How frequently were you in the town of Saline in June and July, and also in May, 1866?

A. I could not tell you that.

Q. Do you remember a barber who did shaving in a tent located on the lot where the Daily Block now stands, in the spring and summer of 1866?

A. No, sir, I dont remember. I never was shaved by a barber in my life.

CHARLES HASKIT.

Subscribed and sworn to before me on the day, at the place and within the hours in the annexed notice specified.

[Seal] FRANK Y. LOCKE,
Notary Public.

Commission expires, June 29th 1896.

110 In the Circuit Court of the United States for the District of Kansas.

The United States of America, Complainant,
vs.
The Union Pacific Railway Company, Henry Gay, M. J. Wellslager and Wm. Hoard, Defendants.

State of Kansas,
District of Kansas, County of Saline—ss.

I hereby certify, that on the 1st day of June, 1893, before me, Frank Y. Locke, a notary public in and for the County of Saline and State of Kansas personally appeared at the office of Garver & Bond in the city of Salina, Saline County, Kansas, pursuant to the notice hereto annexed, between the hours of nine o'clock a. m. and six o'clock p. m. of said day the witnesses named in said notice, D. R. Wagstaff, Esq., appearing for complainant, and Garver & Bond appearing for the defendants, and the said Henry Oltmans, said John H. Smith, said Dennis Sullivan, said A. C. Hillman, said William Hoard, said Hamilton Jukes, James Haskit and Chas. Haskit being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said, as appears by the depositions hereto annexed. And I further certify that the said depositions were reduced to writing by me, and were, after they had been reduced to writing, subscribed by said witnesses and the same has been retained by me for the purpose of sealing up and directing the same to the Clerk of said court, as required by law.

And I further certify that the reason why said depositions were taken, was that the said witnesses reside at and near the city of Salina, Saline County, Kansas, and more than 100 miles from Topeka, Kansas, the place where this cause is to be tried.

And I further certify, that I am not counsel or attorney to either of the parties, nor am I interested in the event of the cause.

111 And I further certify that the fee for taking said depositions $18.50 has been paid by the defendants, and the same is just and reasonable.

In testimony whereof, I have hereunto set my
[Seal] hand and official seal at the city of Salina, in the County of Saline and State of Kansas, this the 1st day of June, 1893.

FRANK Y. LOCKE, Notary Public.

Com. Expires June 29th, 1896.

Indorsed.—No. 6886. Opened by request of T. F. Garver, Atty for Hoard. Nov. 27, 1893. Geo. F. Sharitt, Clerk. Filed June 6, 1893.

112 The United States of America, Complainant,
vs.
The Union Pacific Company et al., Defendants.

ORDER.

Now upon this 16th day of June, 1893, it appearing to the court upon application of solicitor for complainant and with the consent of defendants that said complainant should have leave to amend its bill by interlineation, or by inserting an extra paragraph. It is, therefore, ordered that said complainant may and is hereby granted until the 10th day of July, 1893, to amend said bill and that the pleading heretofore filed by defendants in said cause shall stand with full force and effect as to said amendment the same as if they had been refiled.

JNO. A. WILLIAMS, Judge.

Indorsed.—No. 6886. In U. S. Circuit Court, Dist. of Ks. 1st Div. The United States vs. The Union Pacific Ry. Co. et al. Order. Filed June 16, 1893. Geo. F. Sharitt, Clerk.

113 In the Circuit Court of the United States for the District of Kansas.

MEMORANDUM OF DECISION.

The United States of America,
6886 against
The Union Pacific Railway Company, William Hoard et al.

This is a bill in equity to cancel a patent, issued September 10th, 1874, to the Union Pacific Railway Company, and to have a deed executed by one Jacob Quinn to William Hoard, one of the defendants herein, declared void. It is alleged in the bill that at the time the map of definite location of the Union Pacific Railway Company, Eastern Division (now known as the Kansas Pacific) was filed, as required by the act of Congress, a pre-emption claim had attached to the land in controversy, and for that reason the land was excepted from the grant to the railroad company.

The evidence in the case discloses that the map of definite location of the railroad was filed on the 8th of May, 1867; that the land was thereafter conveyed by warranty deeds as follows: March 11, 1873, Union Pacific Railway Company to Milo D. Powers; September 3, 1875, Milo D. Powers to Hartman Berg; April 22, 1881, Hartman Berg to William H. Whitman; July 28, 1883, William H. Whitman to Jacob Quinn; September 1, 1885, Jacob Quinn to William Hoard, who now resides upon the land and has ever since the date of his purchase in 1885.

The evidence further discloses that on the 21st day of June, 1866, one Charles Elder filed in the Land Office, at Junction City, Kansas, a declaratory statement as follows:

"I, Charles Elder, of Saline County, Kansas, a single man over the age of twenty-one, a citizen of the United States, did on the 8th day of June, A. D. 1886, settle and improve the N. E. $\frac{1}{4}$ of section 1, town 15, south of range 3, west of the 6th
114 principal meridian, in the district of lands subject to sale at the Land Office, at Junction City, Kansas; which land has not been offered at public sale, and thus rendered subject to private entry; and hereby declare my intention to claim said tract as my pre-emption right under the provisions of said act of the 4th of September, 1841. Given under my hand this 21st day of June, A. D. 1866.

CHARLES ELDER."

In the presence of Edward Martin."

I think the evidence establishes beyond all question that Elder never made settlement on the land in controversy, and the statement in his declaration filed on the 21st of June, 1866, that he did on the 8th day of June, 1866, settle and improve the land in controversy is not sustained by the proof. The act of Congress of 1862, amended in 1864, granted to the defendant railway company, within designated lines, every alternate section of public land designated by odd numbers on each side of the line of road, not sold, reserved, or otherwise disposed of by the United States, "and to which a pre-emption or homestead claim may not have attached at the time the line of said railroad is definitely fixed." Thus we are brought to a consideration of the question whether by the mere act of Elder's filing this declaratory statement in the land office without having made previous settlement as required of pre-emption claimants under the laws of the United States, it can be said that a pre-emption claim had attached to this land within the meaning of the granting act of 1862, and that the land was thereby excepted from the grant to the railroad company. This necessarily leads to an examination of the pre-emption laws of the United States, and the method of initiating a claim thereunder as distinguished from initiating a claim under the homestead laws of the United States. The word *attached* means according to Webster to *bind*, to *fasten*. Therefore for a pre-emption or homestead claim to attach to a piece of land, the claimant must perform the acts re-
115 quired by the laws of the United States to be performed by him, to bind or fasten his claim to the land. In other words he must initiate his right to the land in the way provided by law, so that if he thereafter complies with the re-

quirements of the statute the inchoate right to the land so initiated could ripen into a perfect title. The first thing required of a party desiring to make a pre-emption claim, under the pre-emption laws of the United States, is to make a settlement on the land in person; second, to inhabit and improve the same; and third, to erect a dwelling house thereon (Section 2259, R. S.) This he must do. He is not authorized by the statute to make a declaratory statement until after settlement because in his declaratory statement he must set forth that prior to the date of the declaration he has settled upon and improved the land he seeks. An examination of the statute relating to pre-emptions will show in almost every section that settlement is the first step required by the pre-emption law to initiate a pre-emption claim. Thus Section 2264 provides that wherever a person *settles* or improves a tract of land subject at the time of settlement to private entry, he must file a declaratory statement within thirty days from the date of *settlement*. Section 2265 provides that every claimant under the pre-emption law for land not yet proclaimed for sale shall make his declaratory statement within three months of the date of *settlement*. Section 2266 provides in regard to *settlements* which are authorized upon unsurveyed lands that the claimant shall file his declaratory statement within three months from the date of the receipt at the district land office of the plat of the township embracing such pre-emption *settlement*. Section 2268 provides, "*where a pre-emptor* has taken the initiatory steps required by law in regard to *actual settlement*, and is called away from such settlement by being in the military service that the time for making the proof shall
116 be extended" etc. Section 2271 provides that this chapter shall be so construed as not to confer upon any one a right of pre-emption by reason of a *settlement* made on a tract theretofore disposed of, when such disposal has not been confirmed by the General Land Office. Section 2273 provides, that when two or more persons settle on the same tract of land, the right of pre-emption shall be in him who made the *first settlement*. Section 2274 provides that when *settlements* have been made upon agricultural public lands, prior to the survey thereof, and it has been or shall be ascertained after public surveys have been extended over such land, that [or] two or more settlers have improvements upon the same legal subdivision, it shall be lawful for such settlers to make joint entry, etc. Section 2275 provides where *settlements* with a view to pre-emption have been made before the survey of the lands in the field which are found to have been made on sections 16 and 36 those sections shall be subject to the pre-emption claim of such *settlers*. Thus it will be seen that *settlement* is made the initiatory step by the laws of Congress to secure to a party the right of pre-emption. Indeed it is so declared by the statute

itself in section 2268, this section provides, "when a pre-emptor has taken the *initiatory steps required by law in regard to actual settlement*" he shall have the right, etc. It is not unusual for a number of declaratory statements to be filed on the same piece of land but there can but one pre-emption claim attached or fastened to the land, and that as declared by the statute shall be the one in which the first settlement was made. The language of the granting act does not recognize more than one pre-emption claim to a particular piece of land. The language is, "and to which *a* homestead or pre-emption claim may not have attached." That means a claim which is fastened to the land in the manner provided by law, so that if the subsequent steps in the matter of proof and payment are complied with the inchoate right thus initiated might ripen into a
117 perfect title. No man could get a perfect title to land under the pre-emption laws without settlement. That is the first thing to be done. If he settles he may have this right, and may file his declaratory statement within thirty days in one case, or within three months in the other two cases, or even at a later period if no other rights have intervened. Johnson vs. Towsley, 13th Wallace, page 90.

In the case above cited the record disclosed that settlement was made eight months prior to the time the declaration was filed; yet the Supreme Court held that the claim was a valid one no rights having intervened, and that he might then file his declaration. A very different proceeding is required to initiate a homestead entry. Under the homestead laws the first step required of the person applying to make a homestead entry is, that he shall make affidavit before the register and receiver that he is the head of a family etc., and that the application is made for his exclusive use, and that it is his purpose to settle and cultivate the land, and that he does not make the entry for the use or benefit of any other person. Upon filing this affidavit with the register and receiver, and on payment of five dollars if the entry is for eighty acres, or ten dollars if it is more than eighty acres he shall be permitted to enter the land specified in his application. Thus it will be seen that before he can initiate any right, under the homestead laws, he must make this affidavit and payment, and then, and not until then, is he allowed to settle upon the land for the purpose of securing any rights under the homestead laws. Counsel for the government contend that the question of settlement is immaterial, that the granting "act does not require that the claim shall be a lawful one, or that it shall be initiated properly or otherwise. It is sufficient that there is a claim (pre-emption or homestead) that may have at-
118 tached." I do not see how it can be said that a pre-emption or a homestead claim has attached (that is fastened to a piece of land) until the party has performed

the acts required by law to initiate his right. True, he may not be able to perfect his title because of his failure to comply with the requirements of the statute subsequent to settlement, and such failure would not operate to take the land out of the exception in the granting act, because if he had made a settlement with intention to pre-empt the land that being the first act required by the statute the pre-emption claim by virtue of that act had attached to the land, and it was therefore excepted the same would be true in a homestead if he had filed the affidavit and made the payment which is required by statute as the first step. In either case subsequent failure to make the proof and payment in order to get a perfect title would not have the effect to take the land out of the exception mentioned in the granting act.

In the case of Hosmer vs. Wallace, 97 U. S. at page 779, Mr. Justice Field's delivering the opinion of the court says: "To create a right of pre-emption there must be settlement, inhabitation, and improvement by the pre-emptor." If there can be no right of pre-emption without settlement, how can it be said that a pre-emption claim attached to the land by the mere filing of the declaration where no settlement was made, and where if the party performed each successive step thereafter, as required by the statute, yet his title must necessarily fail. But counsel for the government in his brief says: "The mere filing exhausted the right of the person filing a declaratory statement. The pre-emption right was thus exhausted by having been used or exercised. If such a filing was not a claim what was it? If it did not attach to the land why did it withdraw the land from further or other sale, and why did it prevent another pre-emption or homestead claimant from filing on the same land in utter disregard of this prior
119 filing. Why was a contest or proceeding of any nature to declare the entry invalid necessary if a claim did not attach by the mere act of filing, and if a claim did attach as against a subsequent pre-emptor or a homestead claimant to the same land? Why did not such claim attach as to the defendant railway company? The trouble with this proposition and with the questions propounded in connection therewith is; first, that the lands in the case before us were not subject to private entry as appears affirmatively from the declaratory statement, and therefore the filing of this declaratory statement did not exhaust the right of the person filing the statement. See Johnson vs. Towsley, 13th Wallace, pages 89 and 90.

To the first question I answer that the filing of this paper amounted to absolutely nothing, so far as acquiring any right of pre-emption by reason thereof is concerned. The other

questions contained in the paragraph above quoted from the plaintiff's brief are easily answered. The filing of this paper did not withdraw the land from further or other sale and did not prevent another pre-emption claimant from filing on the same land in utter disregard of this prior filing and no claim attached as against a subsequent pre-emptor, or a homestead claimant to the same land. It is no unusual thing for two or more persons to file declaratory statements in the land offices of the United States, claiming settlement and improvement upon the same piece of land. But the statute provides in such case, "the right of pre-emption shall be in him who made the first settlement."

In regard to the Dunmeyer case I wish to be understood that my suggestions at the hearing went to the extent only of indicating that if the principles announced in that case were to be applied to a pre-emption claim it would be *obiter* for the reason that the court did not have the pre-emption law under consideration in that case. There was no question arising in the case with reference to the pre-emption law, but the question and the sole question was as to when a claim
120 attached, under the homestead laws of the United States. A careful examination of that case, however will disclose that the court did not attempt in any way to discuss or to announce any rule applicable to a pre-emption claim, and made no suggestion whatever as to when or how a pre-emption claim would attach to a piece of land; but on the other hand confined its discussion strictly to the case before it, namely to a homestead. That is why Mr. Justice Miller in writing the opinion in the closing paragraph said: "That the word attach did not mean mere settlement, residence, or cultivation of the land; but it meant a proceeding in the proper land office by which the inchoate right to the land was initiated. It meant by such a proceeding a right of homestead had *fastened* to that land which could ripen into a perfect title by future residence and cultivation." He was there discussing a homestead entry in which under the laws of the United States, the first step to initiate the right was a proceeding in the land office. A homestead entry could not have been initiated by settlement, residence or cultivation. By settlement, residence, or cultivation a right of homestead could not have fastened to the land which could ripen into a perfect title. But by a proceeding and only by a proceeding first had in the land office, and followed up by future residence and cultivation could the right of homestead fasten to the land, in such a way that it could ripen into a perfect title. On the other hand the same learned judge, in announcing the opinion of the court in Johnson against Towsley, held that a pre-emp-

tion claim was initiated by settlement, and although the party neglected to file his declaratory statement in the land office for a period of eight months after the date of his settlement, yet by reason of his settlement upon the land he had initiated a right of pre-emption, and that his right thus initiated was not barred from the mere fact that he neglected to file his declaratory statement within the time prescribed by the statute, no rights having intervened.

121 I have examined every case I could find which would tend to throw any light upon this question, and with one exception have been unable to find any case which goes to the extent contended for by the government in this case. That exception is the case of Whitney vs. Taylor reported in the 45th Federal Reporter, at page 616. In that case the learned judge holds, that by the mere filing of a declaratory statement a pre-emption claim attached to the land, and in support of his view he cites the cases of the Railroad Company vs. U. S., 92 U. S. 734; Newhall vs. Sanger, 92 U. S. 761; Railway Company vs. Dunmeyer, 113 U. S. 629; Railroad Company vs. Whitney, 132 U. S. 357. An examination of these cases will disclose that they were either homestead entries, or reservations under Indian or Mexican grants, and that in no one of them was the pre-emption laws under consideration. In the course of the opinion the learned judge in commenting upon these cases says: "It is true that in several of these cases there was either a valid homestead claim initiated by settlement followed by an entry, or a pre-emption claim initiated by a settlement followed by a declaration of intention to purchase; but the decisions are based upon the fact of the filing of the declaratory statements in the proper land office." The trouble about this statement is that a homestead claim can never, under the laws of the United States, be initiated by a settlement followed by an entry. Upon the other hand it must be initiated by an entry followed by a settlement. Hence the decisions in homestead cases are properly based upon the fact of filings made in the land office, for that is the first step required by the statute to initiate a homestead entry. While as I have already shown a very different proceeding is required to initiate a pre-emption claim, the first step being a settlement with three months to file the declaration after settlement. In the first case a homestead entry attaches by reason of the filing; in the second case a pre-emption attaches by reason of

122 the settlement. In the case of a homestead the filing segregates the land from the public lands of the United States, and the inchoate right to the land is initiated by that act. In the case of a pre-emption the settlement segre-

gates it from the public lands of the United States, and the inchoate right is initiated by that act.

Where a homestead claim had attached by reason of the filing in the proper land office, or where a pre-emption claim had been initiated and therefore attached to the land by settlement at the time the map of definite location was filed, the land was excepted from the grant no matter if the parties did thereafter fail to comply with the laws and to perfect the title. If the entry was cancelled for that reason the land would not go to the railroad company, but would be open for settlement. But without settlement and improvement in the case of a pre-emption no claim whatever attached to the land.

The testimony shows that the defendant Hoard purchased this land in good faith, relying upon the patent from the government to the railroad company; that he at the time of his purchase paid five thousand dollars for the land; that he has since made valuable and expensive improvements thereon. In making his purchase I think he had the right to rely on the patent as being an act of the government which was final and controlling as to the title. Under the facts of this case I must decline to give my assent to a decree which would deprive him of the benefits of his investment and years of labor unless the Court of Appeals shall by its mandate direct me to enter such a decree. A decree will be entered in this court dismissing the bill and allowing an appeal.

Indorsed.—No. 6886. The United States vs. The U. P. Ry. Co. et al. Memorandum of Decision. Filed April 9, 1894. Geo. F. Sharitt, Clerk.

123

6886

The United States of America,
vs.
The Union Pacific Railway Company et al.

This cause having been heretofore submitted to the court, on the pleadings, proof, and argument of counsel, whereupon the court took the case under advisement. And now on this 9th day of April, 1894, the court having carefully considered the same, and being fully advised in the premises, doth consider, order, adjudge and decree that the Bill of Complaint herein be and the same is hereby dismissed to which order of the court the complainant excepts. It is further ordered that an appeal be and the same is allowed without bond.

JOHN A. RINER, Judge.

Indorsed.—No. 6886. Decree. Filed Apr. 9, 1894. Geo. F. Sharitt, Clerk.

124 In the United States Circuit Court of Appeals for the Eighth Circuit.

ASSIGNMENT OF ERRORS.

United States of America, Appellants,
vs.
The Union Pacific Railway Company, Henry Gay, M. J. Wellsloger and William Hoard, Appellees.

Now come the United States of America, by W. C. Perry, United States Attorney for the District of Kansas, hereunto lawfully authorized and directed by the Attorney General of the United States, and says that in the record and proceedings in the above entitled suit in the Circuit Court of the United States for the First Division of the District of Kansas, there is manifest error in this, to-wit:

First, the court erred in holding that settlement on a pre-emption claim was necessary for a claim to "attach" within the meaning of the acts of Congress granting lands to the appellee, the Union Pacific Railway Company and to its predecessors and assignors.

Second, the court erred in holding that by the filing of pre-emption declaratory statement on the land described in complainant's bill, in the proper land office, without settlement, a claim did not attach to said land within the meaning of the acts of Congress granting lands to the appellee, the Union Pacific Railway Company, its predecessors and assignors so as to take said land out of the terms of said grants.

Third, the court erred in holding that the filing of the declaratory statement by Charles Elder on the 21st day of June, 1866, in the land office at Junction City, Kansas, on the land described in complainants' bill, did not take such land out of the operation of the acts of Congress granting lands to the appellee, the Union Pacific Railway Company, or to its
125 predecessors and assignors, and that by the filing of said declaratory statement by the said Charles Elder, a claim did not attach to said land within the meaning of said acts of Congress.

Fourth, the court erred in holding that oral evidence could be introduced, and the question of settlement on the land in controversy could be inquired into by such evidence to show that a pre-emption claim had not attached to the land described in complainant's bill within the meaning of the acts of Congress granting land to appellee, The Union Pacific Railway Company or its predecessors and assignors, notwithstanding the records of the Land Office show that a pre-emp-

tion declaratory statement alleging settlement on and improvement of said land by one Charles Elder was filed in said Land Office prior to the filing of the map of definite location of the appellee, the Union Pacific Railway Company, or of its predecessors or assignors.

Fifth, the court erred in holding that for a claim to attach to the lands described in complainants' bill under a pre-emption claim, within the meaning of the acts of Congress granting lands to the appellee, the Union Pacific Railway Company, or to its predecessors and assignors, it was necessary for such pre-emption claim to be initiated by actual settlement on said land under the pre-emption laws of the United States, prior to the filing of the map of definite location of said Union Pacific Railway Company, or of its predecessors and assignors.

Sixth, the court erred in holding that the patent to the lands in controversy, issued to the Kansas Pacific Railway Company, the predecessor and assignor of the appellee, The Union Pacific Railway Company, by appellants, was final and controlling as to the title to said lands.

Seventh, the court erred in holding that the records of the Land Office showing the filing of the pre-emption de-
126 claratory statement on the lands in question, claiming settlement on and improvement thereof prior to the filing of the map of definite location by the appellee, The Union Pacific Railway Company, or by its predecessors or assignors, was not conclusive on said railway company, its predecessors or assignors, or their grantees, but that the fact of such settlement on said land could be inquired into in this tribunal by said railway company or its grantees and that the records of the Land Office could be disputed to show that a claim did not "attach" to said land.

Eighth, the court erred in dismissing complainants' bill.

Ninth, the court erred in its order and decree refusing to cancel the patent to the lands described in complainants' bill as therein prayed for.

Tenth, the court erred in granting a decree in favor of defendants and in refusing to decree complainants the relief prayed for in their bill.

Eleventh, the court erred in refusing to render a decree cancelling and annulling the patent to the lands described in

complainant's bill and in refusing to decree said patent void and of no effect at law or in equity as against complainant.

W. C. PERRY,
United States Attorney and Solicitor for Complainants.

MORRIS CLIGGITT, of counsel.

Indorsed.—No. 6886. United States of America vs. The Union Pacific Railway Company. Assignment of Errors. Filed May 25, 1894. Geo. F. Sharitt, Clerk.

127 United States of America,
District of Kansas—ss.

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the record and proceedings in said court in the case of the United States of America, complainant, against The Union Pacific Railway Company et al. defendants, No. 6886. I further certify that the original citation is returned herewith and made a part of this transcript.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said District of Kansas, this 20 day of June, A. D. 1894.

Seal of the Circuit Court of the United States, District of Kansas.

GEO. F. SHARITT, Clerk.

Filed June 28, 1894, John D. Jordan, Clerk.

88 And on the second day of August, A. D. 1894, an appearance of counsel for appellant was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit. May term, 1894.

THE UNITED STATES, APPELLANT,
vs.
THE UNION PACIFIC RAILWAY CO. } No. 495.

The clerk will enter my appearance as counsel for the appellant.

W. C. PERRY.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. May term, 1894. No. 495. United States, appellant, vs. The Union Pacific Railway Co. Appearance. Filed Aug. 2, 1894. John D. Jordan, clerk. W. C. Perry, U. S. atty. Fort Scott, Kan. Counsel for appellant.

And on the thirty-first day of August, A. D. 1894, an appearance of counsel for appellee Union Pacific Railway Company was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit. May term, 1894.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
THE UNION PACIFIC RAILWAY CO. ET AL. } No. 495.

The clerk will enter my appearance as counsel for the appellees, Union Pacific Railway Company.

A. L. WILLIAMS and
N. H. LOOMIS.

89 (Endorsed:) U. S. circuit court of appeals, eighth circuit. May term, 1894. No. 495. United States of America, appellant, vs. Union Pacific Ry. Co. et al. Appearance. Filed Aug. 31, 1894. John D. Jordan, clerk. A. L. Williams, N. H. Loomis, counsel for appellees.

And on the third day of September, A. D. 1894, an appearance of counsel for appellee Wm. Hoard was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

In the United States circuit court of appeals, eighth circuit.

UNITED STATES OF AMERICA, APPELLANT,
vs.
THE UNION PACIFIC RY. COMPANY, HENRY GAY, M. J. Wellslager, and William Hoard, appellees.

To the clerk of said court:

Please enter my appearance as attorney for William Hoard, one of the defendants in the above entitled cause.

T. F. GARVER,
Attorney for William Hoard.

(Endorsed:) No. 495. United States of America, appellant, vs. U. P. Ry. Co. et al., appellees. Appearance for Wm. Hoard. Filed Sep. 3, 1894. John D. Jordan, clerk.

And on the tenth day of September, A. D. 1894, there was filed in the clerk's office of said circuit court of appeals in said cause a motion of the Northern Pacific Railroad Company for leave to intervene and file brief, which said motion is in the words and figures following to, wit:

90 United States circuit court of appeals, eighth circuit.

UNITED STATES OF AMERICA, APPELLANT,
vs.
UNION PACIFIC RAILWAY COMPANY ET AL., APPELLEES.

Motion to intervene.

Comes now the Northern Pacific Railroad Company, and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers of the Northern Pacific Railroad Company, and move the court for permission to intervene in and be permitted to file a brief and be heard on behalf of said appellees in the above-entitled cause.

This motion is based upon the affidavit of F. M. Dudley hereunto attached.

F. M. DUDLEY,
Solicitor for N. P. R. R. Co., and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, Receivers.

STATE OF MINNESOTA,
County of Ramsey, ss:

F. M. Dudley, being first duly sworn, upon oath doth depose and say: That he has been for several years past general land attorney for the Northern Pacific Railroad Company, and is now general land attorney for Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, the receivers of said Northern Pacific Railroad Company; that as such general land attorney he has charge of and supervision over all the litigation, both in the courts and in the land offices, connected with and growing out of the land grant to said company by the act of Congress approved July 2, 1864; that he has examined the record in cause No. 495, entitled

91 "United States of America vs. The Union Pacific Railway Company, Henry Gay, M. J. Wellsloger, and William Hoard, appellees," pending in the United States circuit court of appeals for the eighth circuit; that the question at issue in said cause, to wit, whether the filing of a declaratory statement, without more, will operate to attach to land a preemption or other claim or right which would except it from a grant like that to the Union Pacific Railway Company or to the Northern Pacific Railroad Company, is one of the utmost importance to said Northern Pacific Railroad Company; that it is now and has been since 1888 the settled and established doctrine of the Interior Department that such filing, without more, operates to except the lands described therein from such grants; that under and in accordance with such rulings more than fifty cases have been decided or are now pending in the land offices and the lands involved therein held excepted from the said Northern Pacific Railroad Company's grant; that a decision in said cause of United States of America

v. Union Pacific Railway Company et al. will, as affiant believes, settle and determine this question. And if, as affiant believes the law to be, it be held that such filing is not sufficient alone to exclude lands from the grant, such ruling will operate to prevent a great depletion of said Northern Pacific Railroad Company's grant, and will prevent the bringing of many actions by said railroad company which otherwise will be essential for the protection of its land grant. That affiant has applied to and received from said appellees in said cause permission to intervene therein and file a brief, as requested in the motion based upon this affidavit.

F. M. DUDLEY.

Subscribed and sworn to before me this 10th day of September, A. D. 1894.

[SEAL.] LOUISE B. TROTT,
Deputy Clerk U. S. Circuit Court, District of Minn.

92 (Endorsed:) No. 495. United Stated of America, appellant, vs. Union Pacific Railway Company et al. Motion Northern Pacific Railroad Co. for leave to intervene and file brief. Filed Sept. 10, 1894. John D. Jordan, clerk.

And on the tenth day of September, A. D. 1894, in the record of the proceedings of said circuit court of appeals is an order granting leave to Northern Pacific Railroad Company to file brief, in words and figures following, to wit:

United States circuit court of appeals, eighth circuit. May term, 1894.

MONDAY, *September 10, 1894.*

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
THE UNION PACIFIC RAILWAY CO. ET AL., APPELLEES. } No. 495.

Appeal from the circuit court of the United States for the district of Kansas.

On motion of counsel for the Northern Pacific Railroad Company it is now here ordered that said Northern Pacific Railroad Company have leave to intervene herein for the purpose of filing a brief upon the questions in controversy herein.

And on the twenty-first day of January, A. D. 1895, in the record of the proceedings of said circuit court of appeals is an entry in said cause in the words and figures following, to-wit:

93 United States circuit court of appeals, eighth circuit. December term, 1894.

MONDAY, *January 21, 1895.*

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
THE UNION PACIFIC RAILWAY COMPANY ET AL., appellees. } No. 495.

Appeal from the circuit court of the United States for the district of Kansas.

This cause having been called for hearing in its regular order, argument was commenced by Mr. W. C. Perry in behalf of appellant, and

continued by Mr. T. F. Garver in behalf of the appellees, and the hour of adjournment having arrived before the conclusion thereof, further argument was postponed until to-morrow morning.

And on the twenty-second day of January, A. D. 1895, in the record of the proceedings of said circuit court of appeals is an order of submission of said cause in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit. December term, 1894.

TUESDAY, *January 22nd, 1895.*

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
THE UNION PACIFIC RAILWAY COMPANY ET AL., appellees. } No. 495.

Appeal from the circuit court of the United States for the district of Kansas.

94 This cause having been called this day for further hearing, argument was continued by Mr. T. F. Garver and Mr. N. H. Loomis in behalf of the appellees, and concluded by Mr. W. C. Perry for appellant. Thereupon this cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

And on the sixth day of May, A. D. 1895, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

95 In the United States circuit court of appeals, eighth circuit. May term, A. D. 1895.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
THE UNION PACIFIC RAILWAY COMPANY, HENRY GAY, M. J. Wellsloger, and William Hoard, appellees. } No. 495.

Appeal from the circuit court of the United States for the district of Kansas.

Mr. W. C. Perry, United States attorney, for appellant.

Mr. T. F. Garver (Mr. T. L. Bond was with him on brief) for appellee Wm. Hoard.

Mr. N. H. Loomis (Mr. A. L. Williams and Mr. R. W. Blair were with him on the brief) for appellee Union Pacific Railway Company.

Mr. Fred M. Dudley, attorney for Northern Pacific Railroad Company, filed brief by leave of court.

Before Caldwell, Sanborn, and Thayer, circuit judges.

STATEMENT.

This is an appeal from a decree which dismissed a bill exhibited by the appellant, The United States, under the act of March 3, 1887 (24 Stat., 556), to set aside a patent of one hundred and sixty acres of land, issued on September 10, 1874, to the Kansas Pacific Railroad Company under the act of July 1, 1862 (12 Stat., ch. 120, secs. 3, 8, pp. 489, 492, 494), and the acts amendatory thereof, and to restore to the United

States the title under that patent, which at the commencement of this suit was held by the appellee William Hoard. The original grant was made to the Leavenworth, Pawnee & Western Railroad Company of Kansas. The name of that company was subsequently changed to the Union Pacific Railway Company, Eastern Division, then to the Kansas Pacific Railroad Company, and that company was
96 afterwards consolidated with the appellee The Union Pacific Railway Company, which has succeeded to all the rights this railroad company acquired under any of its names. In all particulars essential to the determination of this case the terms of this grant were the same as those of the grant considered in the case of The United States v. The Winona & St. Peter Railroad Company, The Winona & St. Peter Land Company, and The Minnesota Land and Investment Company, et als., No. 564, Fed. Rep. supra, (11 Stat., 195). But the act of July 1, 1862, authorized the President of the United States to issue a patent for the lands within the grant opposite the constructed road whenever forty consecutive miles of it had been completed. On May 8, 1867, the railroad company filed its map of the definite location of its line of railroad opposite the land here in controversey. This land was part of an odd section within the place limits of the grant. At the time of the definite location of the line of the road opposite this land a declaratory statement had been filed upon it under the preemption laws. This filing was canceled by the proper officer of the Land Office on October 3, 1871. On September 29, 1871, one J. G. Mohler made a homestead entry upon said tract of land, which was canceled on September 9, 1873. On July 28, 1885, Mohler applied to the proper officer of the land office, for the reinstatement of his homestead entry. His application was rejected, and he made application to purchase the land under section two of the act of June 15, 1880; but this application was rejected. On March 11, 1873, the Kansas Pacific Railroad Company conveyed this land by warranty deed to one Powers. On September 3, 1875, Powers conveyed by like deed to one Berg. On April 22, 1881, Berg by like deed conveyed to one Whitman. On July 28, 1883, Whitman conveyed by like deed to one Quinn. On September 1, 1885, Quinn conveyed the land to the appellee William Hoard. The patent to the Kansas Pacific Railroad Company and the deeds which conveyed the title under that patent to Quinn were duly recorded in the office where the land is situated, and an abstract of title, which disclosed the complete chain of title, was furnished to Hoard before he purchased. There was a one-story house, a barn, and a stable upon the land, and one hundred and ten acres of it were under cultivation when Hoard made his purchase. He bought the land of Quinn, who was then in possession of it, in 1885, and paid him five thousand dollars for it. He has since lived upon and cultivated it as a farm. He had no notice of any defects in the title or of any claim of anyone but Quinn to any interest in the land until after he had purchased and paid for it.

Sanborn, J., after stating the facts as above, delivered the opinion of the court:

The principles announced in United States v. The Winona & St. Peter Railroad Company and The Winona & St. Peter Land Company, and The Minnesota Land & Investment Company et als., No. 564, Fed. Rep. , supra, are decisive of this case.

97 Conceding, but not deciding, that by the previous filing of the declaratory statement preemption rights had attached to this land at the time when the line of the railroad opposite to it was definitely fixed, this land was excepted from the grant to the railroad company; but the land was within the jurisdiction and its disposition within the power of the Land Department of the United States. The patent issued by that Department to the railroad company was not void but conveyed the legal title. The appellee William Hoard was a bona fide purchaser for value of that title, without notice of any defects in it, and his equitable rights as such purchaser are superior to the equitable claims of the United States to have the title restored to it, and constitute a complete defense to this suit.

The decree below must be affirmed without costs to either party in this court, and it is so ordered.

Filed May 6, 1895.

98 And on the sixth day of May, A. D. 1895, in the record of the proceedings of said circuit court of appeals is a decree in said cause in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit. May term, 1895.

MONDAY, *May 6, 1895.*

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
THE UNION PACIFIC RAILWAY COMPANY, HENRY GAY, M. J. Wellsloger, and William Hoard, appellees. } No. 495.

Appeal from the circuit court of the United States for the district of Kansas.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kansas, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed without costs to either party in this court. May 6, 1895.

And on the thirtieth day of July, A. D. 1895, there was filed in the clerk's office of said circuit court of appeals a petition for an order allowing appeal in words and figures following, to wit:

99 United States circuit court of appeals for the eighth circuit.

THE UNITED STATES OF AMERICA, APPELLANTS,
vs.
THE UNION PACIFIC RAILWAY COMPANY, HENRY GAY, M. J. Wellsloger, and William Hoard, appellees.

Petition for appeal.

Come now the United States of America, the appellants above named, by W. C. Perry, their solicitor, and said appellants considering themselves aggrieved by the decree of the said United States circuit court of appeals for the eighth circuit, entered at its May term, 1895, and on the

6th day of May, 1895, in the suit above stated, and showing to the court that this is a case in which there is of right an appeal to the Supreme Court of the United States, do hereby appeal from said decree to the Supreme Court of the United States, and pray that the appeal of appellants may be allowed, and that a transcript of the record and papers on which said decree was rendered, together with a copy of the opinion of said circuit court of appeals, duly authenticated, may be sent to the Supreme Court of the United States.

W. C. PERRY,
Solicitor for Appellants.

Order allowing appeal.

Now on this 22 day of July, 1895, at the May, 1895, term of the United States circuit court of appeals for the eighth circuit, it is ordered that an appeal be, and the same hereby is, allowed as prayed for above, and the clerk of this court is directed to transmit to the clerk of
100 the Supreme Court of the United States a duly authenticated transcript of the record, together with a copy of the opinion of this court, in the suit above entitled.

(Signed) WALTER H. SANBORN,
Circuit Judge.

(Endorsed:) No. 495. U. S. circuit court of appeals for eighth cir. The United States of America vs. Union Pacific Railway Co. et al. Petition for and order allowing appeal. Filed Jul. 30, 1895. John D. Jordan, clerk.

And on the thirtieth day of July, A. D. 1895, there was filed in the clerk's office of said circuit court of appeals an assignment of errors, in words and figures following, to wit:

United States circuit court of appeals for the eighth circuit.

THE UNITED STATES OF AMERICA, APPELLANTS,
vs.
THE UNION PACIFIC RAILWAY COMPANY, HENRY GAY, M. J. Wellsloger, and William Hoard, appellees. } No. 495.

Assignment of errors on appeal to Supreme Court.

Come now the United States of America (by W. C. Perry, United States attorney for the district of Kansas, and solicitor for appellants, hereunto lawfully authorized and directed by the Attorney-General of the United States) and say that in the record and proceedings in the suit above entitled in the United States circuit court of appeals for the eighth circuit there is manifest error in this, to wit:

101 First. In the order and decree of said circuit court of appeals to the effect that the decree of the circuit court of the United States for the district of Kansas be affirmed.

Second. In that said circuit court of appeals refused to reverse the decree of the circuit court for the district of Kansas, first division, by which the bill of complaint in this suit was dismissed.

Third. In holding that notwithstanding the land in controversy was excepted from the grant made by Congress to the railway company, yet the Land Department of the Government had jurisdiction and authority to convey the same to said railway company.

Fourth. In holding that the appellee William Hoard was a bona fide purchaser for value of the legal title to said land without notice of any defects therein, and in holding that his equitable rights as said purchaser are superior to the equitable claim of the United States to have the patent to said land annulled.

Fifth. In refusing to hold that the patent of date September 10, 1894, by which the land in controversy was apparently conveyed to the Kansas Pacific Railway Company was absolutely void, and in refusing to hold that the Land Department was utterly without legal power to convey said land, or to divest the United States of their title thereto.

Sixth. In refusing to hold that the homestead entry of J. G. Mohler to said land dated September 29, 1871, is not still in full force; in refusing to hold that the action of the Land Department in cancelling said entry on December 2, 1871, without notice, was void and of no effect, said cancellation being based solely on the erroneous belief that the land was within the grant to the railway company.

Seventh. In affirming the holding of the circuit court to the
102 effect that settlement on a preemption claim was necessary for a claim to attach within the meaning of the acts of Congress granting lands to the Pacific railway companies.

Eighth. In affirming the holding of the circuit court that the filing of the declaratory statement by Charles Elder on the 21st day of June, 1866, in the land office at Junction City, Kansas, on the land in question did not take said land entirely out of the operation of the acts of Congress granting lands to the Pacific railway companies.

Ninth. In affirming the holding of the circuit court that oral evidence could be introduced, and the question of settlement inquired into by means of such evidence, to show that a preemption claim had not attached to said land nothwithstanding the records of the land office show that a preemption declaratory statement alleging settlement on and improvement of said land by one Charles Elder was filed in the proper land office prior to the filing of the map of definite location by the railway company.

In affirming the holding of the circuit court that for a claim to attach to land under a preemption claim, within the meaning of the acts of Congress granting lands to the Pacific railway companies, it was necessary for said preemption claim to be initiated by actual settlement prior to the filing of the map of definite location by the railway company.

Eleventh. In affirming the holding of the circuit court that the patent to the land in controversy issued to the predecessor of the Union Pacific Railway Company was final and controlling as to the title to said land.

Twelfth. In affirming the holding of the circuit court that the records of the land office showing the filing of a preemption declaratory statement on the land in question, claiming and asserting settlement
103 on and improvement thereof, on a date prior to the filing of the map of definite location by the railway company, was not conclusive on said railway company, its assignors and grantees, but that the

fact of settlement could be enquired into in this suit by the railway company or its grantees, and that the records of the land office could be disputed by oral evidence tending to prove that a settlement had not been made on the land prior to the filing of the map of definite location, and that therefore a claim under the preemption law did not attach to the land by virtue of the filing in the land office.

Wherefore the United States pray that the decree of said United States circuit court of appeals for the eighth circuit in this suit may be reversed and held for naught, and that the decree of the circuit court for the district of Kansas may be reversed and set aside, and for such other or further relief in the premises as may be proper.

W. C. PERRY,
United States Attorney and Solicitor for Appellants.

(Endorsed:) No. 495. U. S. cir. ct. of appeals, eighth cir. The U. S. vs. U. P. Ry. Co. et al. Assignment of errors. Filed Jul. 30, 1895. John D. Jordan, clerk.

And on the thirtieth day of July, A. D. 1895, a citation was filed in the clerk's office of said circuit court of appeals, the original of which, with the acknowledgments of service thereon, is hereto attached and herewith returned.

104 THE UNITED STATES OF AMERICA.

To the Union Pacific Railway Company, Henry Gay, M. J. Wellsloger, and William Hoard, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein the United States of America is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Walter H. Sanborn, judge of the United States circuit court of appeals for the eighth circuit, this 22 day of July, in the year of our Lord one thousand eight hundred and ninety-five.

WALTER H. SANBORN,
Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

(Indorsed:) 495. No. . United States Supreme Court. The United States of America, appellant, vs. Union Pacific Railway Co. et al. Citation on appeal. Filed Jul. 30, 1895. John D. Jordan, clerk.

United States court of appeals for the eighth circuit.

UNITED STATES OF AMERICA, APPELLANTS,
v.
THE UNION PACIFIC RAILWAY COMPANY, HENRY GAY, M. J. Wellsloger, and William Hoard, appellees. } No. 495.

Acknowledgement of service of citation.

As solicitor of record for the Union Pacific Railway Company, appellee above named, I hereby acknowledge service of the citation in the suit above entitled, signed by Walter H. Sanborn, judge of the court above named, on the 22nd day of July, 1895.

A. L. WILLIAMS & N. H. LOOMIS,
Solicitors of Record for the Union Pacific Railway Co.

(Indorsed:) 495. United States of America, appellants, v. Union Pacific Railway Co. et al., appellees. Acknowledgement of service of citation.

United States court of appeals for the eighth circuit.

UNITED STATES OF AMERICA, APPELLANTS,
v.
THE UNION PACIFIC RAILWAY COMPANY, HENRY GAY, M. J. Wellsloger, and William Hoard, appellees.

Acknowledgement of service of citation.

As solicitors of record for Henry Gay, appellee above named, we herewith acknowledge service of the citation in the suit above entitled, signed by Walter H. Sanborn, judge of the court above named, on the 22nd day of July, 1895.

BURCH & BURCH,
Solicitors of Record for Henry Gay.

(Indorsed:) 495. United States of America, appellants, v. Union Pacific Railway Co. et al., appellees. Acknowledgement of service of citation.

United States court of appeals for the eighth circuit.

UNITED STATES OF AMERICA, APPELLANTS,
v.
THE UNION PACIFIC RAILWAY COMPANY, HENRY GAY, M. J. Wellsloger, and William Hoard, appellees.

Acknowledgement of service of citation.

As solicitor of record for William Hoard, appellees above named, I hereby acknowledge service of the citation in the suit above entitled, signed by Walter H. Sanborn, judge of the court above named, on the 22nd day of July, 1895.

T. F. GARVER,
Solicitor of Record for William Hoard.

(Indorsed:) 495. United States of America, appellants, v. Union Pacific Railway Co. et al., appellees. Acknowledgement of service of citation.

105 United States circuit court of appeals, eighth circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing 104 pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of The United States of America, appellant, vs. The Union Pacific Railway Company et al., appellees, No. 495, May term, 1895, as the same remain upon the files and records of said United States circuit court of appeals.

I do further certify that on the eighth day of July, A. D. 1895, there was issued out of the clerk's office of said United States circuit court of appeals, a mandate in accordance with the opinion and decree of said court, directed to the circuit court of the United States for the district of Kansas.

I further certify that the original citation in said cause is hereto attached and herewith returned.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals at the city of St. Louis, Missouri, this 12th day of August, A. D. 1895.

[SEAL.] JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

(Indorsement on cover:) Case No. 15989. Term No. 699. U. S. circuit ct. of appeals, eighth circuit. The United States, appellant, vs. The Union Pacific Railway Company, Henry Gay, M. J. Wellsloger, and William Hoard. Filed August 15, 1895.

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165-482

Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

165-482

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
THE UNION PACIFIC RAILWAY COMPANY, HENRY GAY, M. J. WELLSLOGER, AND WILLIAM HOARD. } No. 319.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
THE UNION PACIFIC RAILWAY COMPANY, Henry Gay, M. J. Wellsloger, and William Hoard. } No. 319.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

This is an appeal from the decree of the circuit court of appeals for the eighth circuit, affirming, on appeal, the decree of the circuit court of the United States for the district of Kansas.

The United States exhibited in the said circuit court its bill in equity under the act of March 3, 1887, to set aside a patent of 160 acres of land, issued on September 10, 1874, to the Kansas Pacific Railroad Company under the act of July 1, 1862, and the acts amendatory thereof, and to restore to the United States the title under that

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
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patent, which at the commencement of this suit was held by the appellee, William Hoard. The original grant was made to the Leavenworth, Pawnee and Western Railroad Company of Kansas. The name of that company was subsequently changed to The Union Pacific Railway Company, Eastern Division, then to The Kansas Pacific Railroad Company, and that company was afterwards consolidated with the appellee, the Union Pacific Railway Company, which has succeeded to all the rights this railroad company acquired under any of its names.

The material facts of the case may be stated chronologically as follows:

1866, June 21, Charles Elder filed his declaratory statement, alleging settlement upon the said land under the preemption laws of the United States on the 18th of June, 1866, which said declaratory statement was filed in the United States land office at Salina, Kans.

1866, July 14, the Kansas Pacific Railway Company, before its consolidation with the Union Pacific Railway Company, filed a map in the office of the Commissioner of the General Land Office at Washington, designating the general route of its road.

1867, May 8, said company filed a map of definite location of the line of said road.

1871, September 29, J. G. Mohler made homestead entry upon said tract of land in the United States land office at Salina, Kans.

1871, October 3, the preemption of the said Charles Elder was canceled.

1874, September 10, a patent was issued in the name of the United States to the Kansas Pacific Railway

Company, under which patent the defendant Hoard claimed title to said lands.

The patent to the Kansas Pacific Railroad Company and the deeds under which the several subsequent purchasers claimed title to said land were duly recorded in the office where the land was situated. Sanborn, J., delivering the opinion of the circuit court of appeals, said (Rec., 93):

> The principles announced in *United States* v. *The Winona and St. Peter Railroad Company*, etc., are decisive of this case. Conceding, but not deciding, that by the previous filing of the declaratory statement preemption rights had attached to this land at the time when the line of railroad opposite to it was definitely fixed, this land was excepted from the grant to the railroad company, but the land was within the jurisdiction and its disposition within the power of the Land Department of the United States. The patent issued by that Department to the railroad company was not void, but conveyed the legal title.
>
> The appellee, William Hoard, was a bona fide purchaser for value of that title without notice of any defects in it, and his equitable rights as such purchaser are superior to the equitable claims of the United States to have the title restored to it [sic] and constitute a complete defense to this suit.

ARGUMENT.

Of course, if the several conclusions announced in the opinion of Judge Sanborn are sound, the contention upon the part of the United States here must fail. But since this opinion was delivered the Supreme Court of the United States has decided several cases arising under

the railroad grants, and rested its judgments upon grounds which can not be reconciled, but are altogether inconsistent with these views expressed in the opinion of the circuit court of appeals.

Elder's preemption claim attached to this land June 21, 1866. The map of definite location of the Kansas Pacific Railroad Company was not filed until May 8, 1867, and the preemption claim of Elder was not canceled until October 3, 1871, so that it appears the preemption claim of Elder was a subsisting claim attaching to the land at the time the map of definite location of the railroad was filed and the rights of the railroad company vested.

In *Weeks* v. *Bridgman* (159 U. S., 545), this court, speaking through Mr. Justice Fuller, said:

> The line of the road was definitely fixed December 30, 1857. The lands within the place limits then subject to the grant were thereby segregated from the public domain, and the grant took effect thereon. But under the granting act lands to which preemption rights had attached when the line was definitely fixed were as much excepted therefrom as if in a deed they had been excluded by the terms of the conveyance, and this was true in respect of applications for preemption rejected by the local land office and pending on appeal in the Land Department at the time of definite location, since the initiation of the inchoate right to the land would prevent the passage of title by the grant, and the determination of its final destination would rest with the Government and the claimant.

So, the fact that the preemption entry of Elder was subsequently canceled did not prevent its being a sub-

sisting claim attaching to the land at the time the grant to the railroad took effect. The lands to which the preemption claim had attached, being excepted from those embraced in the grant to the railroad company, were not covered by such grant, did not pass under it to the company, and, consequently, any patent issued in the name of the United States embracing the lands so excepted was a nullity, and did not convey the legal title to said lands.

In *Burfenning* v. *Chicago, St. Paul, etc., Railway* (163 U. S., 323), this court, speaking through Mr. Justice Brewer, said:

> But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and preemption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in the patent, transfer no title, and may be challenged in an action at law. In other words, the action of the Land Department can not override the expressed will of Congress or convey away public lands in disregard or defiance thereof.

The legislation on the subject of these railroad grants and the rights and liabilities which accrued thereunder are fully considered and explained in the opinion of Mr. Justice Miller in *Kansas Pacific Railway Co.* v. *Dunmeyer*, (113 U. S., 636); and the effect of the preemption entry and the rights resulting therefrom are shown in the opinion of Mr. Justice Brewer in *Whitney* v. *Taylor* (158 U. S., 88).

From the cases here cited it would seem to follow very plainly that the opinion of the circuit court of appeals is erroneous in the following particulars: That the lands excepted from the grant to the railroad company, by reason of the preemption claim attaching thereto, were not within the jurisdiction or the power of disposition of the Land Department of the United States while the preemption entries remained uncanceled; that the patent issued by the Land Department to the railroad company did not convey the legal title to said lands, and that William Hoard was not a bona fide purchaser of said land, because his purchase was derived from a source which was without jurisdiction or power to convey said lands.

HOLMES CONRAD,
Solicitor-General.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 319.

THE UNITED STATES,
Appellant,
vs.
THE UNION PACIFIC RAILWAY COMPANY, HENRY GAY, M. J. WELLSLOGER and WILLIAM HOARD.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNION PACIFIC RAILWAY COMPANY AND WILLIAM HOARD.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON AND
T. F. GARVER,
Of Counsel for the Railway Company and William Hoard.

C. G. Burgoyne, Walker and Centre Streets, New York.—1896.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 319.

THE UNITED STATES,
Appellant,

vs.

THE UNION PACIFIC RAILWAY COMPANY, HENRY GAY, M. J. WELLSLOGER, and WILLIAM HOARD.

Brief for the Union Pacific Railway Company and William Hoard.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Statement of the Case.

This is a suit in equity brought August 18, 1892, by the United States in the Circuit Court of the United States for the District of Kansas, First Division, against the Union Pacific Railway Company and others, to have the patent granted by the United States to the Kansas Pacific Railway Company (to which said Union Pacific Railway Company is successor), for 160 acres of land, declared void and canceled as a cloud upon the title of the United States *(Complaint, Record*, pp. 2–5).

The Bill of Complaint.

The bill of complaint states that on June 21, 1866, and for a long time prior thereto, the United States was the owner of the land in question; that the said land had then been duly surveyed, and was a part of the public land of the United States, subject to the disposal of the Congress of the United States under the provisions of the public land laws relating to homesteads and preemptions; and that said land was within the jurisdiction of the Salina land office.

Grant by congress to railway company. The complaint then states that, by an act of congress of July 1, 1862, there was granted to the predecessor of the Union Pacific Railway Company every alternate section of land designated by odd numbers to the amount of five alternate sections per mile on each side of said railroad, and within the limits of ten miles on each side of said road, not reserved or otherwise disposed of by the United States and to which a preemption or homestead claim may not have been attached at the time said road should be definitely fixed. That the name of the railroad company was given in the act of Congress as the Leavenworth, Pawnee and Western Railroad Company. This was afterwards changed to the Union Pacific Railway Company, Eastern Division; and again changed to the Kansas Pacific Railway Company. Afterwards the said company was consolidated with the Union Pacific Railroad Company and the Denver Pacific Railway and Telegraph Company, and formed the Union Pacific Railway Company, which consolidated company succeeded to all the rights of the said Kansas Pacific Railway Company.

MAPS OF GENERAL ROUTE AND DEFINITE LOCATION FILED BY RAILWAY COMPANY. The complaint further states that the Kansas Pacific Railway Company, before its consolidation with the Union Pacific, duly designated the general route of its road by filing a map in the office of the Commissioner of the General Land Office at Washington on July 14, 1866, and duly filed a map of definite location of the line of said road opposite the tract of land now in question on May 8, 1867.

DECLARATORY STATEMENT FOR PRE-EMPTION ENTRY FILED BY CHARLES ELDER.—The complaint further states that, prior to the definite location of the line of road as aforesaid, and prior even to the filing of the map of general route, and while said land was subject to homestead and pre-emption entry, to wit, on June 21, 1866, one CHARLES ELDER filed his declaratory statement, alleging settlement upon said land under the pre-emption laws of the United States on June 18, 1896; and that the said declaratory statement was filed in the United States land office at Salina, Kansas; that, in settling upon said land, said Charles Elder complied with all laws relating to the proper entry on the public land by pre-emption entry, and that said entry was in full force and effect prior to and at the time of the definite location of said line of road opposite to said tract of land.

ELDER'S PRE-EMPTION ENTRY CANCELED.—The complaint further states that the said pre-emption entry of said Charles Elder was canceled October 3, 1871. [*the order of the Commissioner of the General Land Office canceling the said declaratory statement filed by Charles Elder is set forth in the Record at pages 18 and 19, and bears date October 23, 1871*].

MOHLER'S HOMESTEAD ENTRY AND CANCELLATION THEREOF.—The complaint also alleges that J. G. MOHLER

made a homestead entry upon said tract of land on September 29, 1871, in the United States land office at Salina, Kansas, and that, by reason of the erroneous belief to the effect that said railroad company was entitled to said land under its grant, said homestead entry of said Mohler was wrongfully canceled September 9, 1873.

PATENT ISSUED TO KANSAS PACIFIC RAILWAY COMPANY. The complaint further states that on September 10, 1874, a patent was erroneously and illegally issued by the proper officers of the United States to the said Kansas Pacific Railway Company, and that said company claimed the title to said land under said patent.

DEMAND FOR RECONVEYANCE TO UNITED STATES. The complaint further sets forth that a demand was duly made upon the said Union Pacific Railway Company for the reconveyance of the said land to the United States, which demand said railway company refused to comply with.

CONVEYANCE BY RAILWAY COMPANY TO POWERS AND BY MESNE CONVEYANCES TO HOARD. The complaint further states that on March 11, 1873, the said Kansas Pacific Railway Company deeded said land by warranty deed to one MILO N. POWERS; that the deed was recorded; and that through sundry mesne conveyances one WILLIAM HOARD claims title to said land; and that Henry Gay and M. J. Wellsloger claim to have some interest in said land by virtue of some alleged mortgage given by William Hoard and wife and his grantor.

THE PRAYER of the complaint is, in substance, that it be adjudged and decreed that the legal title to said land is vested in the United States; that the said patent is void and of no effect either in law or equity;

and that it be declared to be a cloud and be delivered up to be canceled, together with the said mortgage of said Gay and Wellsloger; and that the deed of the said William Hoard may be declared void and a cloud upon the title; and that the defendants be restrained from setting up any title to the land.

The Answer.

Answer of defendant William Hoard. The defendant William Hoard made a separate answer to the complaint (*Record*, pp. 7–9). This answer contains, among other things, *a denial that the said* Charles Elder *at any time made settlement upon said land* as required by the pre-emption laws of the United States, and an averment that at no time either before or after the filing of the said declaratory statement did said Charles Elder make settlement upon or in any manner improve said tract of land, or do anything in reference thereto except to file his declaratory statement in the United States land office, and that no legal claim ever attached to said land by reason of said declaratory statement.

This answer of William Hoard also avers the fact to be that said J. G. Mohler, who filed a homestead entry, never entered upon said land, or made any settlement or improvement thereon, and voluntarily submitted to the claims of the railroad company made with reference thereto.

This answer further alleges that on September 10, 1874, the proper officers of the United States, in pursuance of the authority conferred upon them by law, and for the purpose of giving effect to the grant of lands made by the said acts of congress in aid of the

construction of the said Kansas Pacific Railway, fully investigated and considered the right of the said railway company to said land, and certified the same for a patent and that on *September 10, 1874, a* PATENT *was duly executed and delivered by the United States to the said Union Pacific Railway Company,* conveying the title to said land; and that said patent was recorded in the office of the register of deeds of Saline county, Kansas, on December 19, 1874.

PLEA OF BONA-FIDE PURCHASERS PRECEDING TITLE OF HOARD.

This answer further states *(Record,* p. 9*)* that on March 11, 1873, said Kansas Pacific Railway Company duly conveyed by warranty deed said tract of land to one MILO M. POWERS; that on September 3, 1875, said Milo M. Powers by warranty deed conveyed said land to one HARTMAN BERG; that on April 22, 1881, said Hartman Berg by warranty deed duly conveyed said tract of land to one WILLIAM H. WHITMAN; and that on July 28, 1883, said William H. Whitman by warranty deed duly conveyed said land to one JAMES QUINN; and that all said conveyances were made to *bona-fide* purchasers for valuable consideration and in reliance upon the title of said Kansas Pacific Railway Company acquired from the United States.

PLEA THAT HOARD IS ALSO BONA FIDE PURCHASER.

The said answer of WILLIAM HOARD further states that on September 1, 1885, he purchased said tract of land from said JAMES QUINN, and paid therefor the sum of $5,000, and received from said James Quinn and wife a warranty deed conveying the said land, and that, in making said purchase and accepting said conveyance, he (said Hoard) had no notice or knowledge of any kind of any defect in the title to said land,

or of the filing of the said declaratory statement by said Charles Elder, and that he relied upon the patent of the United States to the said Kansas Pacific Railway Company and the conveyances subsequent thereto, and believed that by said conveyances from said Quinn and wife and the prior conveyances including said patent, he became invested with the full legal title to the said land, and that since said purchase he has been in actual and continuous possession of said land, and that there has been no claim set up or made to said land by any person other than such claim as has been made on behalf of the complainant the United States.

The said Union Pacific Railway Company demurred to the bill of complaint (*Record*, p. 11). December 5, 1892, the complainant moved to set the cause down for a hearing upon bill and answer (*Record*, p. 12). December 10, 1892, leave was granted to the complainant to amend its bill of complaint, and leave was also given to the defendants to file answers thereto (*Ib.*).

Amended Bill of Complaint.

An amended complaint was accordingly filed (*Record*, pp. 12–17). The amendments consisted in setting forth more particularly the alleged facts in regard to the *homestead filing of* said J. G. Mohler made September 29, 1871; and that he did not voluntarily abandon said entry, but by erroneous rulings of the officers of the Department of the Interior he was precluded from complying with the terms and conditions of the Homestead Act (*Record*, pp. 14, 15); also that said Mohler, on July 28, 1885, made application to purchase said land under an act of Congress relating to the public lands approved June 15, 1880 (21 *Stat.*, 237); and this application was rejected.

HEARING UPON MOHLER'S APPLICATION FOR HOMESTEAD. The defendant WILLIAM HOARD'S amended answer (*Record*, pp. 19–23) sets up, among other things, a hearing upon the validity of said entry of said J. G. MOHLER; that said Mohler had due notice of said hearing, was a party thereto, and participated therein; and that one of the issues in said hearing was whether said CHARLES ELDER had made settlement on said tract of land prior to the filing of his declaratory statement therefor; and that, as a result of said hearing, and of the examination of the testimony by the Commissioner of the General Land Office, it was found by him that the filing by said CHARLES ELDER was not preceded by personal settlement, and that Elder never lived upon or improved the land.

ANSWER OF RAILWAY COMPANY. It was stipulated in writing between the complainant and the Union Pacific Railway Company that the answer of HOARD should stand, and be taken as and for the answer of the said railway company (*Record*, pp. 23, 24).

GENERAL REPLICATION FILED BY UNITED STATES. The complainant filed a general replication to the answer of the defendant William Hoard (*Record*, p. 24).

THE PROOFS.

TESTIMONY was taken both by the complainant and by the defendants. Among other evidence introduced by the complainant was an order of W. W. CURTIS, acting commissioner of the land office, dated Sept. 14, 1871, addressed to the register and receiver, Salina, Kansas (*Record*, p. 35), in which he refers to the application of J. G. MOHLER for homestead entry, and states that the lands applied for were withdrawn

for the Kansas Pacific Railway Company, June 20, 1867, at which time there existed thereon unexpired pre-emption claims which had inception prior to the date of withdrawal; and decided that these lands formed no part of the railroad grant, but upon the abandonment or cancellation of the pre-emption filing the lands were again opened to pre-emption or homestead entry; and ordered that the parties be notified of the decision, and that those be permitted to perfect their respective entries who were entitled so to do. This decision of the acting commissioner was overruled by the commissioner, WILLIS DRUMMOND, in a decision dated Nov. 1, 1871, addressed to the register and receiver, Salina, Kansas (*Record*, pp. 36–38), in which he decided that in case of a pre-emption filing made with allegation of previous settlement where it could be clearly shown that such settlement was not in fact made, such filing was in derogation of law and fraudulent, and consequently not a pre-emption right recognized by the law, and did not withdraw the land from the right of the railway company. This order of the commissioner directed the register and receiver that in case where applications had been made or should be made to enter any such lands, hearings be had, with due notice of time of hearing to the applicant, the original pre-emptor and the railway company, at which time the company might have opportunity to prove the fraudulent character of the filing. It appears that a hearing was accordingly had in the case of the application of J. G. MOHLER, and after the testimony had been transmitted to the general land office it was decided that, inasmuch as the filing of CHARLES ELDER had not been preceded by personal settlement, and that

the lands had been abandoned by him, there was no valid claim existing thereto at the date of the withdrawal for the Kansas Pacific Railway, June 20, 1867; and that the land therefore inured to the said company *(see letter of W. W. Curtis, acting commissioner, dated May 15, 1873; Record, p. 39)*.

PLEA OF BONA FIDE PURCHASER PROVED. The defendants introduced together with other testimony that of the defendant WILLIAM HOARD (*Record*, p. 59, *et seq.*) and proved by him that he purchased the land in question in good faith, and paid therefor the sum of $5,000; and that he had no notice or knowledge of the filing on the land by said Charles Elder, or later by said Mohler; also, that at the time he purchased the land, JAMES QUINN, the grantor, was living on it; and that there was a house, barn, stable and orchard, and 110 acres under plough. He also introduced in evidence his warranty deed from Quinn and an abstract of title, a copy of which appears in the Record at page 40. This abstract shows a perfect chain of conveyances, and the amounts of consideration named in the various deeds, all of which are warranty deeds. That Hoard was a *bona fide* purchaser is undisputed in the evidence, and was found to be true by both courts below. There was other testimony which clearly established the fact that ELDER made no settlement upon the land prior to the time of filing his declaratory pre-emption statement. The Court so found (Record, pp. 84, 94).

COMPLAINT DISMISSED BY CIRCUIT COURT. The circuit court by its final decree of April 9, 1894, dismissed the complaint (*Record*, p. 84). The opinion is found in the Record at page 77. Thereupon the complainant took an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, and that court affirmed

the decision of the Circuit Court May 6, 1895 (*Record*, p. 94).

THE OPINION of the Circuit Court of Appeals is given at pages 92 and 93 of the Record, and refers to the opinion rendered in the case of the *United States vs. Winona and Saint Peter Railway Company*, 67 Fed. Rep., 948, as decisive of this case. The Circuit Court held that, by reason of the fact that the initial proceeding to acquire land under the pre-emption laws is a settlement, and because at the time that CHARLES ELDER filed his declaratory statement for a pre-emption he had not made any settlement, nor had made any thereafter, therefore the declaratory statement was fraudulent and void, and no pre-emption right had attached to the land thereunder; and hence the land was not excepted from the railroad grant. The Circuit Court of Appeals, without passing upon this point, held that the patent by the United States to the railroad company was not void, but conveyed the legal title; and that, as the defendant WILLIAM HOARD was a *bona fide* purchaser of that title, his equitable rights as such purchaser are superior to the equitable claims of the United States to have the title restored to it, and constitute a complete defense to the suit (*Record*, p. 94).

The United States thereupon appealed to this Court.

ARGUMENT.

POINT I.

The patent in question issued by the proper officers of the United States to the Kansas Pacific Railway Company was not void, but was at the most only voidable. Hence, this patent transferred the legal title, and it cannot be canceled as against a bona fide purchaser.

The argument on the other side rests wholly upon the fundamental proposition that the patent of the lands in question is not simply voidable, but utterly void, because such patent was beyond the jurisdiction of the officers who issued it. We proceed, therefore, to examine this proposition.

We will consider:

(A) The statutes of the United States that relate to it; and

(B) The decisions of this Court bearing upon the questions of law arising out of these statutes and the facts of this case.

A.

The Statutes of the United States.

"REVISED STATUTES OF THE UNITED STATES.

"SEC. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects. * * * 2d. The public lands including mines."

"SEC. 446. There shall be in the Department of the Interior a Commissioner of the General Land Office."

"SEC. 453. The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to surveying and sale of the public lands of the United States, or in any wise respecting such public lands and the issuing of patents for all grants of lands under the authority of the government."

[*Construction of the foregoing sections by this Court see infra, p.* 31 *et seq.*]

The Land Grant to the Kansas Pacific Company.

July 1, 1862, Congress passed an act (12 Stat., 489) granting a charter to the Union Pacific Rail*road* Company, prescribing in general the route of its road, from a point on the 100th meridian, in Nebraska—called the "initial point"—westward to the western boundary of Nevada (Sec. 1), and the "Iowa branch," "from a point on the western boundary of the State of Iowa, to be fixed by the President of the United States," to said "initial point," on the 100th meridian, constituting what was for a long time the Union Pacific Rail*road*, and what is now that part of the railroad of the (consolidated) Union Pacific Rail*way* Company, from Council Bluffs to Ogden. It was a part of the original plan of the Pacific railroads that the eastern "initial point" of the Union Pacific Railroad should be on the 100th meridian, between the Republican and Platte Rivers, in Nebraska, and that branches should be constructed from various places on the Missouri River—Council Bluffs, Kansas City, Sioux City, Leavenworth, Atchison and St. Joseph—to connect with the Union Pacific

Railroad at this "initial point" on the 100th meridian, or with one another at points east of the 100th meridian. The "Iowa Branch," from the 100th meridian to Council Bluffs, was, as has been stated, constructed by the Union Pacific Railroad Company, and that was the only branch constructed or owned by that company. This was a branch only in name; it was really part of the main line as much as any other part.

The Leavenworth, Pawnee and Western Railroad Company was in existence when the Act of Congress of July 1, 1862, was passed, having been chartered by the Territory of Kansas in 1855 (*Laws of Kansas, 1855, p. 914*). Its name was afterwards changed to "Union Pacific Railway Company, Eastern Division," and, later, to the "Kansas Pacific Railway Company."

The said Act of Congress of July 1, 1862, Section 9, authorized the Kansas Pacific Company (then called the Leavenworth, Pawnee and Western Railroad Company) to construct a railroad and telegraph line from Kansas City to the "initial point" of the Union Pacific Railroad above referred to, "*upon the same terms and conditions in all respects*" as provided in the same act for the construction of the Union Pacific Railroad, there to meet and connect with that railroad. This is the original section which, by reference to the grant to the Union Pacific Company, made the land grant to the Kansas Pacific Company. This act, including this Section 9, was afterwards amended, as we shall see later on. For convenience, those parts of Sections 9 and 10 which relate to the Kansas Pacific Company are here printed in full.

ACT OF CONGRESS, JULY 1, 1862, SECS. 9 AND 10.

"SEC. 9. *And be it further enacted*, That the Leavenworth, Pawnee and Western Railroad Company of Kansas are hereby authorized to construct a railroad and telegraph line, from the Missouri River, at the mouth of the Kansas River on the south side thereof, so as to connect with the Pacific Railroad of Missouri, to the aforesaid point, on the one hundredth meridian of longitude west from Greenwich, as herein provided, *upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned*, and to meet and connect with the same at the meridian of longitude aforesaid; and, in case the general route or line of road from the Missouri River to the Rocky Mountains should be so located as to require a departure northwardly from the proposed line of said Kansas railroad before it reaches the meridian of longitude aforesaid, the location of said Kansas road shall be made so as to conform thereto; and said railroad through Kansas shall be so located between the mouth of the Kansas River, as aforesaid, and the aforesaid point, on the one hundredth meridian of longitude, that the several railroads from Missouri and Iowa, herein authorized to connect with the same, can make connection within the limits prescribed in this act, provided the same can be done without deviating from the general direction of the whole line to the Pacific coast. The route in Kansas, west of the meridian of Fort Riley to the aforesaid point, on the hundredth meridian of longitude, to be subject to the approval of the President of the United States, and to be determined by him on actual survey. And said Kansas company may proceed to build said railroad to the aforesaid point, on the one hundredth meridian of longitude west from Greenwich, in the Territory of Nebraska.

* * * * * *

"Each of said companies shall file their acceptance of the conditions of this act in the Department of the Interior within six months after the passage of this act."

"SEC. 10. *And be it further enacted*, That the said company chartered by the State of Kansas shall complete one hundred miles of their said road, commencing at the mouth of the Kansas River as aforesaid, within

two years after filing their assent to the conditions of this act, as herein provided, and one hundred miles per year thereafter until the whole is completed. * * * "

The terms of the original land grant to the Union Pacific Railroad Company (and to the Kansas Pacific Company, by reference in Sec. 9 as above stated) are set forth in the following sections and parts of sections of the act, which, for convenience, are here printed.

ACT JULY 1, 1862, SECS. 3, 4, 7.

"SEC. 3. *And be it further enacted*, that there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad on the line thereof, and within the limits of ten miles on each side of said road, **not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed.**"

"SEC. 4. *And be it further enacted*, That whenever said company shall have completed forty consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three Commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said Commissioners to that effect, **patents shall issue**

conveying the right and title to said lands to said company on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed upon certificate of said Commissioners. Any vacancies occurring in said Board of Commissioners by death, resignation, or otherwise, shall be filled by the President of the United States: Provided, however, that no such Commissioners shall be appointed by the President of the United States, unless there shall be presented to him a statement, verified on oath by the president of said company, that such forty miles have been completed, in the manner required by this act, and setting forth with certainty the points where such forty miles begin and where the same end, which oath shall be taken before a judge of a court of record."

* * * * * *

"SEC. 7. *And be it further enacted*, That said company shall file their assent to this act, under the seal of said company, in the Department of the Interior, within one year after the passage of this act, and shall complete said railroad and telegraph from the point of beginning as herein provided to the western boundary of Nevada Territory before the first day of July, one thousand eight hundred and seventy-four: Provided, That within two years after the passage of this act said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry, and sale; and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purposes herein named."

Section 16 of the Act of July 1, 1862, authorized the consolidation of any two or more of the railroad companies named in the act.

GRANTS AMENDED.—The Act of Congress of July 2, 1864 (13 Stat., 356), amended the land grants to the Union Pacific Company and the Kansas Pacific Company so as to grant double the original quantity of land, as follows:

Section 4 of the Act of July 2, 1864, provides:

"SEC. 4. *And be it further enacted*, That section three of said act be hereby amended by striking out the word 'five,' where the same occurs in said section, and by inserting in lieu thereof the word 'ten;' and by striking out the word 'ten,' where the same occurs in said section, and inserting in lieu thereof the word 'twenty.' And section seven of said act is hereby amended by striking out the word 'fifteen,' where the same occurs in said section, and inserting in lieu thereof the word 'twenty-five.' And the term 'mineral land,' wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land. **And any lands granted by this act or the act to which this is an amendment shall not defeat or impair any pre-emption, homestead, swamp land or other LAWFUL claim, nor include any government reservation or mineral lands, or the improvements of any BONA FIDE SETTLER,** or any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner or agriculturalist, to be ascertained under such rules as have been or may be established by the Commissioner of the General Land Office in conformity with the provisions of the pre-emption laws: Provided, that the quantity thus exempted by the operation of this act and the act to which this act is an amendment shall not exceed one hundred and sixty acres for each settler who claims as an agriculturist; and such quantity for each settler who claims as a miner as the said Commissioner may establish by general regulation. Provided, also, that the phrase 'but where the same shall contain timber the timber thereon is hereby granted to said company,' in the proviso to said section three, shall not apply to the timber growing or being on any land farther than ten miles from the centre line of any one of said roads or branches mentioned in said act or in this act. And all lands shall

be excluded from the operation of this act and of the act to which this act is an amendment, which were located or selected to be located, under the provisions of an act entitled 'an Act donating lands to the several states and territoties which may provide colleges for the benefit of agriculture and the mechanic arts,' approved July second, eighteen hundred and sixty-two, and notice thereof given at the proper land office."

That is, the grant was increased from "*five* alternate sections per mile on each side of said railroad," and "within the limits of *ten* miles on each side of said road" to "*ten* alternate sections per mile on each side of said railroad," and "within the limits of *twenty* miles on each side of said road." In other words, the land grant was exactly doubled.

It was also provided by this Section 4:

"And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption homestead swamp land or other LAWFUL CLAIM, nor include any Government reservation or mineral lands, or the improvements of any BONA FIDE SETTLER," &c.

Thus amended, Section 3, Act July 1, 1862, reads as follows:

"SEC. 3. *And be it further enacted*, that there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of ten alternate sections per mile on each side of said railroad on the line thereof, and within the limits of twenty miles on each side of said road, not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed."

Section 7, Act July 1, 1862, above quoted, provided that upon the company's designating the "*general route*" of its railroad, and filing a map of the same in the Interior Department, the Secretary should cause the lands within *fifteen* miles of said designated route or routes to be withdrawn from pre-emption, private entry and sale; and, when any portion of the route should be "*finally located*," the Secretary should cause the lands to be surveyed and set off. That is, while the lands granted by the Act July 1, 1862, were only "within the limits of *ten* miles on each side of said railroad," Congress, in order to insure to the Company the full quantity of lands in case the route as "*finally* located" should vary from the "*general* route" as designated, provided that, as soon as the company determined upon its "*general route*" and had filed a map thereof, the Secretary of the Interior should temporarily withdraw from market the lands for a further distance of *five* miles, beyond the land grant, on each side of the road—in all, for a distance of *fifteen* miles on each side of the road. When by the Act of July 2, 1864, Section 4, quoted *supra*, the land grant was doubled so as to include the odd sections "within *twenty* miles," it was also provided in the same section that the "lands within *twenty-five* miles" of the designated "*general* route" should be temporarily withdrawn from market—that is, for the same further distance of *five* miles beyond the lands granted.

Section 5 of Act of July 2, 1864, extended for one year the time for filing the map of "*general route.*"

CHANGE OF ROUTE OF KANSAS PACIFIC.—Section 9, Act of July 2, 1864, authorized the Kansas Pacific Company to change the route of its road so as to con-

nect with the Union Pacific Railroad at any point west of the 100th meridian.

Section 16 of the Act, July 2, 1864, as well as Section 16, Act July 1, 1862, granted power to consolidate any two or more of the companies authorized to participate in the benefits of the Act.

The Act of May 7, 1866 (14 Stat., 355), further extended the time for completing the Kansas Pacific road.

The Act of July 3, 1866, Section 1 (14 Stat., 79), further extended the time for the Kansas Pacific Company to designate the general route of its road, and provided that the road should connect with the Union Pacific Railroad, but not at a point more than fifty miles west of the meridian of Denver.

B.

The leading decisions of this Court on the subject of the validity of patents for lands carefully reviewed, and shown to establish the proposition that the patent of the lands in question by the United States on September 10, 1884, was not void, and if erroneous, it was at most only voidable, and cannot be assailed by the United States as against a bona fide purchaser.

It is a question of great moment to all persons who hold under patents of land from the United States to know how far such patents may be impeached by the United States when the land is in the hands of a *bona fide* purchaser.

The general answer to this question is very plain. If the officer issuing it had no jurisdiction to act in the matter the patent is void. On the other hand, if the officer issuing the patent had jurisdiction to act in the matter, but made a wrong decision upon the law and facts, the patent is not void, but at most only voidable at the suit of the Government, unless the land is in the hands of *bona fide* purchasers.

On this subject the following are the leading cases in this Court, and are believed to be all of any importance.

The earliest case is **Polk's Lessee vs. Wendell, 9 Cranch, 87, 1815.** Ejectment. Plaintiff claimed under a patent issued by North Carolina April 17, 1800; defendant under a patent from North Carolina, dated August 28, 1795. In 1789 North Carolina ceded to Congress the territory in which the lands in dispute lie, reserving all existing rights under the State, which were to be perfected according to the laws of North Carolina (p. 100). The Court held (as correctly stated in the head note) that "after the cession of land by North Carolina to the United States the former had no right to grant those lands to any other grantee who had not an incipient title before the cession; and the question whether such incipient title existed is therefore open at law." "A patent is void at law if the State had no title, or if the officer who issued the patent had no authority to do so;" but "in general," says the Court, for reasons which it gives (p. 99), "a court of equity is the more eligible tribunal for these questions (concerning the validity of a patent), and they ought to be excluded from a court of law."

This was, therefore, simply a case where North Carolina issued a patent for land which it had previously ceded to the United States, contrary to the act of cession.

Stoddard vs. Chambers, 2 How., 248, 1844, and Easton vs. Salisbury, 21 How., 426, 1858.

Ejectment for lands in Missouri: The plaintiff in the first-named suit claimed under a Spanish concession; the defendant under a New Madrid location and patent. In both cases above cited the contest was between these two sources of title. By Acts of Congress "all lands claimed under a French or Spanish title, which claim had been filed with the Recorder of Land Titles, as the plaintiff's claim had been, were reserved from sale by the Acts of Congress above stated;" the reservation from sale was absolute; "no such tract shall be offered for sale" (2 Howard, p. 317). By an Act of Congress it was provided that "the holder of a New Madrid certificate had a right to locate it only 'on public lands which had been authorized to be sold.'" A New Madrid certificate was located on lands thus reserved, and a patent issued thereon July 16, 1832 (2 How., p. 317). In 1836 Congress confirmed the plaintiff's title. It was held that the plaintiff's title thus confirmed was good.

"A confirmation by Act of Congress," said the Court, "vests in the confirmee the right of the United States, and a patent, if issued, could only be evidence of this (2 How. p. 316). The defendants' title was void, because his New Madrid certificate was located on lands which were not 'part of the public lands authorized to be sold,' but, on the contrary, were lands 'expressly reserved from sale;' and the Court held that the question thus presented is one 'as well examinable at law as in chancery'" (pp. 316, 317).

Here the decisive feature was that the lands patented were "not part of the public lands authorized to be sold," but by statute "expressly reserved from sale;"

that is, wholly withdrawn from the administration of the officer who issued the patent, with no power on his part to act upon the question or to make any decision concerning it.

The next case to which we refer is one where a patent was issued for part of the "Fort Leavenworth Military Reservation." This was a case of a bill in equity by the United States to annul the patent. The case is that of the **United States vs. Stone, 2 Wall., 525, 1864.** This was a bill by the United States to cancel a patent issued to Stone in 1861, as assignee of certain Delaware Indian chiefs, for part of Fort Leavenworth military reservation. The bill was sustained. The boundaries of the reservation had been clearly established under Acts of Congress and action of the President and War Department in 1830, 1839 and 1854. Under the treaty of May 6, 1844, with the Delaware Indians, the southern line of the reservation was recognized by the Indians as the boundary of their cession to the United States.

The treaty of May 30, 1860, allotted to each of certain chiefs "a tract of land" to be selected by themselves from the body of the lands reserved to the tribe by the treaty of May 6, 1854, for its "permanent home," the lands selected to be patented in fee by the President.

Instead of selecting the lands in question from the specified body of the lands, certain tracts within the admitted and established boundaries of the Fort Leavenworth reservation were selected and patented pur-

suant to a decision of the Secretary of the Interior in 1861, that the lands lying between the fort and the southern line of the reservation belonged to the Delawares, and ordered surveys to be made north of that line.

The Court (GRIER, J., p. 537) says:

"The Secretary of the Interior, in 1861, transcended his authority when he attempted to overrule the acts of his predecessors and ordered surveys to be made north of that line [the established line of the reservation] to include the land in question."

The decree below canceling the patents was affirmed.

The essential and obvious feature of the case **is that the Secretary of the Interior had no authority in any Act of Congress or treaty to deal with the land embraced in the military reservation;** on the contrary, the said Acts of Congress and the treaties recognized that reservation as the boundary of the Delawares' lands *and expressly excluded the power and jurisdiction of the Secretary of the Interior to deal with it as part of the public lands of the United States falling within his power to administer or deal with.* The patent was clearly voidable, possibly void. As the suit was one by the United States in equity to cancel the patent, the Court had no occasion to determine, and of course did not determine whether it was absolutely void (in the strict sense of the word) or only voidable.

We next refer to the case of **Reichart vs. Felps, 6 Wall., 160, 1867.** Ejectment for lands in Illinois. The plaintiff claimed under two patents issued by the United States in 1838 and 1853, respectively. The defendant claimed under an old French grant

confirmed under an Act of Congress of June 20, 1788, by an instrument duly executed by the proper official February 12, 1799. The Court held that the plaintiff's patents were void because the United States never *had any title to the land*—a very plain case, but one which has no bearing upon the cases at the bar.

The praise of Judge LOCKWOOD'S opinion in Moore vs. Hill (Breese, Ill. Rep., 236, s. c. 1 Ill. Rep., 304) is well merited.

The next case is that of **Best vs. Polk, 18 Wall., 112, 1873.** Ejectment. Plaintiff claimed under a patent from the United States dated March 13, 1847. The defendant had the title of an *Indian Reservee conferred by the Treaty* of May 24, 1834, with the Chickasaw Indians. This title was located June 17, 1839. The Court held "that the treaty conferred title to these reservations, which was complete when the locations were made to identify them," and "did not need patents to perfect them" (p. 116); therefore, the patent of 1847 to the plaintiff was void, for that it 'attempted to convey lands that had been previously *granted*, reserved from sale or appropriated," that is to say, land to which the United States had no title.

The case of Morton vs. Nebraska, 21 Wall., 660, was one where the *reserved saline lands* were patented when the officer had no jurisdiction to act upon the subject, and where such lands were entirely withdrawn from administration in his department.

The case of Newhall vs. Sanger, 92 U. S., 751, is one where land was patented under a railroad grant which was part of an old *Mexican grant*, and

whose status was expressly declared to be "not part of the public domain of the United States" (p. 763); compare U. S. vs. McLaughlin, 127 U. S., 428, and Carr vs. Quigley, 149 U. S., 653, explaining and limiting *Newhall vs. Sanger.*

The case of Leavenworth, &c., R. R. Co. vs. United States, 92 U. S., 733, is one where part of an *Indian reservation,* to which the Indian title had not been extinguished, was patented to fill an ordinary railroad grant, and the case was a bill by the United States to cancel the patent.

Doolan vs. Carr, 125 U. S., 1887. It was an ejectment by Carr against Doolan and McCue. The United States patented the land to the Central Pacific R. R. Co. under the Pacific Railroad Act of July 1, 1862, by patent dated February 28, 1874, and the Central Pacific Company conveyed it June 10, 1874, to the plaintiff. The defendants offered to show by documentary evidence that the land was covered by an *old Mexican grant made in 1839, confirmed by the proper authorities of the United States* long before the defendant's alleged title had its inception (p. 633). On November 10, 1882, Doolan and McCue entered on the land under a claim of pre-emption settlement. Each made a declaratory statement of his intention to claim and pre-empt the land: but the Register of the Land Office refused to receive it on the ground of the existence of the patent to the railroad company. The Circuit Court rejected the evidence, holding the patent conclusive in this action, and could only be attacked in a direct proceeding by the United States to vacate it (p. 624), and ordered judgment for the plaintiff.

The Supreme Court reversed the judgment and ordered a new trial.

Observe that this case was one where the documentary evidence offered showed title out of the plaintiff under the old Mexican grant, confirmed of record by the authorities of the United States, or under which Mexican grant claims were asserted at the time the route of the Railway Company was definitely fixed. The Circuit Court rejected this evidence and refused to allow that proof or any part of it to be made. For this radical error "of the Court in rejecting this evidence and in the instructions given to the jury on the same point," that the patent was conclusive, the Supreme Court reversed the judgment and ordered a new trial.

Obviously, the majority of the Court treated the case as falling within the principle of *Polk's Lessee vs. Wendell, Stoddard vs. Chambers, Easton vs. Salisbury, Reichard vs. Felps, supra,* and the cases which follow these, holding that an attempt to patent lands which the United States did not own was void.

Clearly this caso of Doolan vs. Carr is not applicable to the case at the bar. For in that case the Land Department undertook to patent lands *which had been ceded by the Government of Mexico before we conquered that country,* and which were in litigation at the time in the tribunals of the United States, if not actually confirmed by the authorities of the United States. Now that has no sort of bearing on our case, because the Secretary of the Interior in that case, unlike ours, was not vested with any jurisdiction in that matter.

OTHER CASES WHICH MAY BE CITED BY THE OPPOSING COUNSEL fall within these same principles, and are inapplicable to the case at bar. Thus the case of

Shepley vs. Cowan, 91 U. S., 330, 1875, was an attempt to pre-empt land under the Act of September 4, 1841, part of the "*commons of the Village of Carondelet*" which had been confirmed by Congress June 13, 1812, which Act was "a present operative grant of all interest in the United States in the property used by the inhabitants of said village as their commons." It was therefore a case where the United States had no title which could be acquired under the Act of 1841.

The case of **Sherman vs. Buick, 96 U. S., 209,** was a contest for a part of a certain Section 36 between a patent of the United States and a patent of the State of California. The California patent was held void because the State of California had *no title to the land patented,* and that by the terms of the Act of Congress under which she claimed she had only the right of seeking indemnity. The Federal patent was accordingly sustained.

Smelting Co. vs. Kemp, 104 U. S., 636, was an action at law. Plaintiff claimed title to a placer mine under a patent from the United States. The attempt to defeat it and to have it held void in this action at law was unsuccessful. This case was cited and approved in Steel vs. Smelting Co., 106 U. S., 447, which latter case we refer to *infra.*

THIS REVIEW OF THE PRINCIPAL CASES where patents have been held void at law justifies the statement above made that they constitute a very small and distinct group consisting of cases arising out of old Spanish and Mexican and other concessions where the United States never had any title, or of cases where patents had been issued for military, Indian, saline, or

other reservations, where the Interior Department was not only not given power to act, but where the subject matter was entirely withdrawn from his jurisdiction. Within this principle falls the case of *Burfenning vs. Chicago, &c., Ry. Co.*, 163 U. S., 321, referred to *infra*.

What bearing have such cases, or the principle on which they rest, upon the case at the bar, where, as above shown, the Secretary of the Interior is not only authorized, but required, to act in respect to the very lands and matters on which he acted when he issued the patent of September 10, 1874, and which recites and embodies his decisions and adjudications.

WE NOW PROCEED to show that the case at the bar falls within the principle of other decisions of this Court to the effect that the Secretary of the Interior did, under the legislation applicable to the subject, have jurisdiction to issue the patent of September 10, 1874.

The case at the bar falls within the doctrine of other decisions of this Court holding that the Secretary of the Interior had jurisdiction to issue the patent of September 10, 1874, and that the same is not void; and not voidable even by the United States after the land has passed into the hands of a bona fide purchaser.

WE HAVE NOW TO DETERMINE THE LEGAL EFFECT of the action of the Secretary of the Interior in respect of the matters committed to his jurisdiction by the Acts of Congress of July 1, 1862, and its amendments (see POINT I, *supra*), and the general legislation of Congress in respect of the powers and jurisdiction of the Interior

Department (Rev. Stats., Secs. 441, 446, 453, cited *supra*, p. 12). Fortunately, this is so well settled by the decisions of this court that really all that it is necessary to do is to ascertain with precision what has been decided and then apply the principles thus authoritatively established to the question in hand.

The principle of law applicable to the powers of the Secretary of the Interior is the well-known doctrine that when a special officer or tribunal is authorized to deal with a given matter or to determine a given matter of fact, the decision of the officer or tribunal is final, unless otherwise declared by the law itself, or unless it can be impeached for fraud, or on other equitable grounds.

Pertinent Cases Decided by this Court Showing the Jurisdiction of the Secretary of the Interior in Patenting the Lands in Question under the Granting Acts.

From the decision of this Court we select several pertinent cases which we consider to establish the proposition that the Secretary of the Interior under the legislation applicable to the transaction had the power to act upon the matter of what lands were of the class granted in the railroad grant, and that his determination thereof embodied and expressed in the patent is, even if erroneous, not void.

Take the case of **Doe vs. Wilson, 23 How., 457.** Ejectment. In a treaty made with the Indians they ceded to the United States certain tracts of land —except certain reservations in the ceded tracts— among which was a reservation to Pet-chi-co of two sec-

tions. The language of the reservation was: The United States agree "to grant to each of the following persons the quantity of land annexed to their names, which lands shall be conveyed to them by patent." Then follows this sentence: "**The foregoing reservations shall be selected under the direction of the President of the United States, after the lands shall be surveyed, and the boundaries to correspond with the public surveys.**"

Now, what did the President do? The treaty was that he was to make the selections *within* the ceded limits. That was the power—*within* the ceded limits. According to two cases—this one of Doe vs. Wilson, and its sequel, Crews vs. Burcham—it was offered on the trial of the ejectment action to be shown that in making these selections he did not keep *within* the ceded lands, but went outside and selected land there. The United States in the case at bar may say that patent, if it was for land *outside* of the ceded limits, was void. The President in such a matter has no more power than the Secretary of the Interior.

"In January, 1837, patents were issued to Pet-chi-co and his heirs for the two sections mentioned in the treaty. In 1845 certain persons obtained a deed from the heirs of Pet-chi-co, and under this deed the plaintiffs claim upon the ground that the deed from Pet-chi-co in 1833 was invalid. Wilson claimed under a later deed. The leading questions in the case were, therefore, whether Pet-chi-co had the right to make the deed when it was made."

The Court in that case was asked to instruct the jury (p. 463):

"that the defendants cannot claim or hold the land as assignees of Pet-chi-co, by virtue of the treaty, if the lands embraced in the patents to Pet-chi-co did not lie

within the section of country ceded by the treaty of 27th October, 1832."

This demand for instruction was refused. The Court say:

"There is no evidence in the record showing where the land granted by the patents lies, except that which is furnished by the patents themselves. They recite the stipulation in the treaty in Pet-chi-co's behalf; that the selections for him of sections nine and ten had been made, 'as being the sections to which Pet-chi-co is entitled' under the treaty. *The recitals in the patents conclude all controversy on this point.*"

Thus the Court held that the patent was conclusive.

In the subsequent case of **Crews vs. Burcham, 1 Black, 352,** which was also an action of ejectment, the same principle was affirmed. The point was again made that a portion of the land embraced in the patent, which was given under a treaty with a tribe of Indians, by which certain reservations selected *within* the lands ceded by the Indians were to be patented, *did not lie within the district ceded*, and hence was void for want of authority in the officer to issue it. If the claim made was correct, as a matter of fact, there was no authority to issue such a patent. The Court, NELSON, J., says:

"The same objection was taken in the case of Doe vs. Wilson, and the answer given was, the recitals in the patent, that the sections were those selected by the President, and to which the reservee was entitled under the treaty, *were conclusive on the point; and we may add that certainly no third party had any right to complain if the facts were as alleged.*"

This, it is submitted, covers every point in the case at the bar, for in the case at the bar the patent of the lands in question by the Interior Department sets

forth that the lands described are land *granted under the Act of Congress of July 1st, 1862.*

So, too, the case of **United States vs. Schurz, 102 U. S., 378,** in principle covers precisely the case at this bar. Here a homestead entry, followed by a patent, was made of lands *which were not subject to such homestead entry, because under the Act of March 2d, 1867, the land thus entered was within the limits of an incorporated town ;* and it was thereupon contended that the patent was absolutely *void* and that *no* title whatever passed by force thereof. But this Court held otherwise, and that the patent was at most voidable, and voidable only at the instance of the Government if it could make a case entitling it to relief on equitable grounds. This case is especially in point, because the patent was issued contrary to the express terms of the said Act of March 2, 1867 (14 Stats., 541).

The reasons for the judgment of the Court are relevant to the subject under consideration, and are thus stated by Mr. Justice MILLER :

" It is argued with much plausibility that the relator (the pre-emptor and patentee) was not entitled to the land by the laws of the United States, because it was not subject to the homestead entry, and that the patent is, therefore, void, and the law will not require the Secretary to do a vain thing by delivering it, which may at the same time embarrass the rights of others in regard to the said land. We are not prepared to say that if the patent is absolutely void, so that no right could possibly accrue to the plaintiff under it, the suggestion would not be a sound one.

" But the *distinction between a void and a voidable instrument*, though sometimes a very nice one, is still a well-recognized distinction on which valuable rights often depend. And the case before us is one to which we think it is clearly applicable. *To the officers of the Land Department, among whom we include the Secretary of the Interior, is confided, as we have already said, the*

administration of the laws concerning the sale of the public domain. The land in the present case had been surveyed, and, under their control, the land in that district generally had been opened to pre-emption, homestead entry and sale. **The question whether any particular tract, belonging to the Government, was open to sale, pre-emption or homestead right, is in every instance a question of law as applied to the facts for the determination of those officers.** *Their decision of such question and of conflicting claims to the same land by different parties is judicial in its character.*

"It is clear that the right and duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction. *When their decision of such a question is finally made and recorded in the shape of a patent, how can it be said that the instrument is absolutely void for such errors as these?* If a patent should issue for land in the State of Massachusetts, where the Government never had any, it would be absolutely void. If it should issue for land once owned by the Government, but long before sold and conveyed by a patent to another who held possession, it might be held void in a court of law on the production of the senior patent. *But such is not the case before us.* Here the question is whether this land had been withdrawn from the control of the Land Department by certain acts of other persons, which include it within the limits of an incorporated town. *The whole question is one of disputed law and disputed facts.* It was a question for the land officers to consider and decide before they determined to issue McBride's Patent. It was within their jurisdiction to do so. *If they decided erroneously, the patent may be voidable, but not absolutely void.*"

These principles are equally applicable here. The question here is whether the land, which was public land, was of the kind or class which was subject to the grant. This was a question of fact and law for the

Secretary of the Interior to decide before he issued the patent. He did decide it, and decided it, as we think, correctly. It is therefore unimpeachable even by the United States. Even if he decided it erroneously, the list and certificate which embodied such decision would not be void—at most it would be voidable.

So, too, in the case of **Steel vs. Smelting Company, 106 U. S., 447,** the Smelting Company had a patent from the United States to the lands in question. The action was ejectment. The defense of the defendant is thus stated by the Court:

"The amended answer averred that the defendants were the owners of the land in controversy 'by superiority of possessory title and priority of actual possession' of the premises as a part of a *town site on the public domain of the United States*, located and occupied since June, 1860; that the title of the plaintiff was derived from one Thomas Starr, to whom a patent was issued by the United States, bearing date on the 29th of March, 1879, embracing the premises in controversy; *and the special defenses set up were that the patent was void; that fraud, bribery, perjury and subornation of perjury were used to obtain it; and that Starr, the patentee, was estopped by his conduct from asserting title to the premises.* The patent which is subsequently stated to be a mineral patent, by which is meant that it issued upon a claim for mineral land, is averred to be void on these grounds; that the land which **it embraces was part of the town site of Leadville when the claim originated, and was thus reserved from sale by the laws of Congress; that the land included in the town site was neither mineral nor agricultural;** and that the patentee, Starr, was not a citizen of the United States, and had not declared his intention to become one when the patent was issued. These grounds are accompanied with a detail of the facts upon which they are founded, but they are sufficiently stated for the disposition of the questions arising upon them."

The Court held that a patent executed in the required form and by the proper officers, for a portion of the public domain, which is by law subject to sale or other disposal, passes the title thereto, although such land was *reserved* by law from sale as part of the town site of Leadville, and the finding of the facts by the Land Department which authorizes its issue is conclusive in a court of law. Smelting Company vs. Kemp, 104 U. S., 636, is cited upon this and approved. The Court said:

"We have so often had occasion to speak of the Land Department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the *effect to be given to the action of that department*, overlook our decisions on the subject. *That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily*, therefore, it *must consider* and *pass upon* the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and **whether it is of the class which is open to sale.** Its *judgment* upon these matters is that of a special tribunal, and is *unassailable*, except by direct proceedings for its annulment or limitation. Such has been the *uniform language* of this Court in *repeated decisions*."

One of the later cases in this Court is that of

Chandler vs. Calumet & Hecla Mining Co., 149 U. S., 79, 1892. Ejectment. In 1887 the State of Michigan patented the land to the plaintiff as part of its swamp-land grant under the Act of 1850. In 1852 Congress made a grant of land to Michigan of lands to build a ship canal. The agent of the State selected the land in question to satisfy the

canal grant, and the Secretary of the Interior in 1855 approved the selections and certified them to the State under the canal grant, and the State patented them to the canal company in consideration of the construction of the canal. HELD that the canal company got the title by this patent. HELD also that this title could not be impeached by oral evidence that the lands were in fact swamp land. The patent was conclusive upon the State at law, and could be impeached, if at all, only by bill in equity (p. 93).

We next refer to **Barden vs. N. P. R. R. Co.,** 154 *U. S.*, 288.

The granting act of Congress then under consideration *expressly excepted mineral lands* from its operation. Our opponents would say that the Interior Department had *no power* or *jurisdiction* to approve and patent selections of mineral lands, and, therefore, any patent issued for such lands would be *absolutely void* for want of authority in the officer issuing it. But this Court, FIELD, J., said :

"It is the established doctrine, expressed in numerous decisions of this Court, that wherever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire and determine as to the existence of such facts, and in the absence of fraud, imposition or mistake its determination is conclusive against collateral attack."

If the patent has been issued unadvisedly, without investigation, the Court says the consequence must be borne by the Government, until, by further legislation, a stricter attention by the officers of the Land Department can be enforced.

"**The fact remains,**" says the Court, "**that under the law the duty of determining the character of the lands granted by Congress, and stating it in instruments transferring the title of the Government to the grantees, reposes in the officers of the land department.** * * * The grant, even when all the acts required of the grantees are performed, only passes a title to non-mineral lands; but a patent issued, in proper form, upon a judgment rendered after a due examination of the subject by officers of the land department charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the Government from contending to the contrary, and as we have already said, in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title."

In that case the land department had made no adjudication, and therefore the character of the lands—whether they were covered by the grant or not—was an open question for the Court; but if there had been such adjudication, it would have been held conclusive.

We need not pursue *seriatim* other cases relating to this general subject which have been decided by this Court, since they are referred to in the last judgment of this court relating to this subject in the case of **Burfenning vs. The Chicago, St. Paul, &c., Ry. Co.,** 163 U. S., 321, decided in 1895. The decisive feature of the case last cited is that the patent in that case was issued for lands which for two years had been within the incorporated limits of the City of Minneapolis as such limits were established by *a public act* which took effect March the 8th, 1881. The record of the land depart-

ment, says the court, shows that the right of the patentee was initiated March 27th, 1883—that is to say, two years after this public act embracing the lands within the limits of an incorporated city. The Revised Statutes, sections 2258 and 2289, in express terms excluded from pre-emption and homestead "lands included within the limits of any incorporated town or selected as the site of a city or town." The court thereupon say:

that the case "is one where affirmatively and by the *record* it is disclosed that there was no pretense or semblance of claim on the part of the patentee until two years subsequent to the organization of the City, and in that respect differs from Texas & Pacific Ry. Co. vs. Smith, 159 U. S., 66." It was held that the patent was void. This case does not overrule or even refer to the leading and well-considered case of the United States vs. Schurz, 102 U. S., 378, where, as in the Burfenning case, lands were homesteaded within the limits of an incorporated City,—Grantsville in Utah. Notwithstanding this, it was held, and that is the very point of the Schurz case, that the patent was was at most voidable, but not void.

The Interior Department Had Jurisdiction.

The course of the Interior Department as appears in the record in respect of this very matter shows that it assumed and exercised the jurisdiction as in all land grant cases under similar land grants to determine whether there was any homestead claim or not (see Record, pp. 35 to 39). It was a mixed question of law and fact whether at the date of definite location any valid pre-emption or homestead claim had (in the lan-

guage of the Act of Congress making the grant) "attached" to the land. Some tribunal must exist in order to determine such a question. The lands were public lands of the United States. No other tribunal does exist except the land department. It had and exercised this jurisdiction; it heard the parties, received proofs, considered them, and entered its judgment. In this we maintain it was in the exercise of its clear and undoubted jurisdiction. To hold otherwise is to say there is no tribunal by which this question could be determined, and the United States is driven in this case to the alternative of maintaining that if the Interior Department decides this question right it has jurisdiction, but if it decides it wrong it has none; whereas jurisdiction means the power to enter upon the hearing of the controversy at all—whichever way the decision may be given. See, on this point, **Orchard vs. Alexander**, 157 U. S., 372. The head-note states accurately the decision as follows:

"The Commissioner of the General Land Office may direct the proper local land office to hear and pass upon charges of fraud in the final proof of the pre-emption claim, upon which the requisite cash entry has been paid, and has jurisdiction to review the judgment of the local land officer in respect thereof; and the Secretary of the Interior has jurisdiction to review such judgment of the Commissioners and order such an entry, shown to be fraudulent, to be canceled."

And that is just what the Interior Department did in this case prior to the issuing of the patent in question, as shown by the record in the cause. This principle was reaffirmed in the case of the **Catholic Bishop of Nesqually vs. Gibbon** (158 U. S., 155), wherein Mr. Justice BREWER, delivering the unanimous opinion of this Court, referring to the Revised States, Sections

441, 453, as to the general duties of the Secretary of the Interior, said (p. 167):

"Referring to this latter section and particularly the clause 'under the direction of the Secretary of the Interior' it was said by Mr. Justice LAMAR, speaking for the Court in *Knight vs. Land Association*, 142 U. S., 161, 177: 'It means that in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the Government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States.' See, also, *Barden vs. Northern Pacific Railroad*, 154 U. S., 288, and cases cited in the opinion. It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express direction to the contrary."

The Interior Department had jurisdiction both of the subject matter and of the parties. It had jurisdiction over the land in question, and it had jurisdiction over the parties to decide their relations and claims to this land.

The argument of the Solicitor General assumes that the filing of the declaratory pre-emption statement by CHARLES ELDER withdrew the land in question from the jurisdiction of the Interior Department. This is clearly an error. The cases of the *Kansas Pacific*

Railway Company vs. Dunmeyer, 113 U. S., 629, and *Whitney vs. Taylor*, 158 U. S., 85, relied on by the Solicitor-General, do not decide any such proposition. What these cases decide is that, upon the filing of the declaratory statement, the land was withdrawn from the **grant to the Kansas Pacific company; but they do not decide that the land was withdrawn from the "jurisdiction" of the Interior Department, which is a very different thing.** On the contrary, the land still remained subject to the jurisdiction of the Interior Department; and it had full power and authority under the statutes of the United States, to hear and determine the claim of ELDER to this land; also the later claim of MOHLER; also the claim of the Kansas Pacific Railway Company; and, at the date of the patent to that Company, September 10, 1894, this land was clearly under the jurisdiction of the Interior Department. It made no difference whether the claim of ELDER or the claim of MOHLER was really good or bad, or decided to be good or bad, so far as this question of jurisdiction was concerned.

It cannot be maintained for a moment that if the Interior Department had decided that the claim of ELDER to the land in question was good and valid and had issued a patent to him, such patent would have been issued without jurisdiction on the alleged ground that the filing of his declaratory statement had withdrawn the land from the jurisdiction of the Interior Department; neither can it be claimed that if the Interior Department, after holding (as it did) that the claim of CHARLES ELDER was invalid, had held the claim of MOHLER good and valid, and had issued a patent to him, such patent would have been issued without

jurisdiction. And yet both these propositions must have followed, if it be true, as is argued by the Solicitor-General, that the filing of the declaratory statement by Charles Elder withdrew the land from the *jurisdiction* of the Interior Department.

So, after the claim of MOHLER had been heard and rejected by the Interior Department, this land still remained public land of the United States under the jurisdiction of the Interior Department; and if the United States had issued a patent to any third person it could not be claimed that such patent was absolutely void on the ground that the Interior Department had not jurisdiction over the subject matter. No more can it be claimed that the patent to the *Kansas Pacific Railway Company*, issued after the rejection of MOHLER'S claim, was absolutely void on the alleged ground that the Interior Department had not jurisdiction of the subject matter, to wit, the land in question.

It cannot be maintained, as is attempted by the Solicitor-General, that if the question of these claims had been decided one way the Department had jurisdiction, but if decided the other way the Department had no jurisdiction. Jurisdiction means the authority to decide at all in respect of the subject matter as between the parties to the controversy, and is never affected by the question whether the decision made in the exercise of the jurisdiction is right or wrong.

This is, therefore, a very different case from that of *Burfenning vs. Chicago, St. Paul, &c., Ry. Co.*, 163 U. S., 321, for in that case the land in question had been withdrawn from the jurisdiction of the Interior Department.

The Solicitor-General cites the case of *Weeks vs. Bridgman*, 159 U. S., 541, but that case does not

sustain his proposition that the Interior Department had no jurisdiction over the lands now in question. In that case this Court sustained the title of the holder of the patent as against the grantee of a railroad company to which no patent had been issued.

That the lands in question in the present case were expressly committed to the jurisdiction of the Interior Department, see the Statutes quoted under Point I., *supra*; also the decision of this Court in *Catholic Bishop of Nesqually vs. Gibbon*, 158 U. S., 155, quoted *supra*, in which Mr. Justice BREWER said (p. 177):

"It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express direction to the contrary."

The error made by the Interior Department in issuing the patent of September 10, 1874, was an error of law. No fraud was practiced in obtaining the patent. But the Department had jurisdiction to issue the patent, though it committed an error of law in so doing.

The decision of the Interior Department that the sham pre-emption entry of Charles Elder did not withdraw the land in question from the grant to the Kansas Pacific Railway Company was made under a mistake of law, and not by reason of any fraud practiced by the

Result of Foregoing Argument Stated and Applied.

It goes without saying that if the above contention is right—namely, that the patent was only voidable as contradistinguished from void—then it was effectual to pass the legal title, and the title of the defendant Hoard (an uncontested *bona fide* purchaser) is good as against any attack by the Government, and this irrespective of the confirmatory provision of Section 4 of the Act of March 3, 1887 (24 Stats., 557, Sec. 4), and irrespective also of the confirmatory act of March 2, 1896, referred to and discussed (Point III., *infra*). This proposition has been so often decided by this Court that it is laid up among the fundamentals of the law upon this subject.

U. S. vs. Burlington, &c., R. R. Co., 98 U. S., 334, 342.

Colorado Coal Co. vs. U. S., 123 U. S., 307, 313.

U. S. vs. California & Oregon Land Co., 148 U. S., 31.

Many other cases to the same effect, which it is unnecessary to cite.

POINT II.

Hoard's title is confirmed by the provisions of Section 4 of the Act of March 3, 1887 (24 Stats, 557.)

This section confirms the title of all *bona fide* purchasers from the Company to which railroad lands have been patented, except those mentioned in Section 3 of the said Act. Section 3 of the Act protects only "the homestead or pre-emption entry of any *bona fide* SETTLER which has been erroneously canceled on account of any railroad grant." ELDER, the original pre-emptor, was a sham pre-emptor. He never made ANY SETTLEMENT on the land. So is all the testimony, and such was the finding of the Land Department and the Circuit Court and of the Circuit Court of Appeals. MOHLER never settled on the land. He admits this in his testimony in the case (Record, p. 28).

What is meant by a "Settler" upon the public lands is well known, and was well known to Congress when it passed the Act of March 3, 1887, here referred to; it means a person who has gone into *actual occupation* of the land and continues such occupation. Thus, the pre-emption law required "settlement," that is, actual occupation before the filing of a declaratory statement for pre-emption entry; and the homestead law required "settlement," that is, actual and continuous occupation immediately after the filing of the application for a homestead entry.

See *Hosmer vs. Wallace*, 97 U. S., 575; and *Bohall vs. Dilla*, 114 U. S., 47.

MOHLER had no vested right in the land. His homestead entry was at most the initiation of what, if he

had followed it up and perfected it, might have ripened into a legal right. The land was vacant and unoccupied for ten years after he made the paper entry, no obstacle being in the way of his making the actual settlement required by law. He admits that he made no settlement (Rec. p. 28). No contest was had until about ten months after the date of the entry, nor was the contest ordered until April 20, 1872, more than six months after the entry. There being no vested right, Congress could make whatever disposition of the land it desired.

Frisbie vs. Whitney, 9 Wall., 187.
Shepley vs. Cowan, 91 U. S., 330.
Atherton vs. Fowler, 96 U. S., 513.
Yosemite Valley Case, 15 Wall., 77.*

By the said act of March 3, 1887, Congress provided for the adjustment and disposition of this class of lands. Only the homestead entry of a "*bona fide settler*" is

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* The nature and extent of the rights of one who attempts to pre-empt public lands (for it was "assumed that the lands in question were open to pre-emption") makes a settlement, and applies to the proper land officers to make his declaration of intention to occupy and cultivate the land, which they refuse to receive, were considered by this Court in the case of **Frisbie vs. Whitney, 9 Wall., 187, 1869.** Frisbie had been in possession under a Mexican grant for years; his title suddenly failed, the land became public land. Whitney entered upon the land in the night, and sought to pre-empt it. Congress passed an act to protect the *bona fide* holders of the old Mexican grant; and it was claimed that Whitney had acquired vested rights which Congress could not interfere with. But this Court decided that a settlement even upon the public lands of the United States, no matter how long continued, conferred no rights against the Government; that a vested right under the pre-emption laws is only obtained when the purchase money has been paid and the receipt of the proper land officer given to the purchaser; the Court expressly sanctioning the doctrine that

"the land continues subject to the absolute disposing power of Congress until the settler has made the required proof of settlement and improvement and paid the requisite purchase money."

provided for. There being no such settler, by section 4 of that act the grantee of the railway company, being a citizen of the United States, is entitled to a patent from the United States, without cost to him. HOARD, in this case, is the only *bona fide* settler. Under this act, defendant HOARD, a citizen of the United States, and a *bona fide* grantee under conveyances from the railway company, may demand title by patent from the United States.

By this suit the Government would destroy the title of the land which he now holds, and which must be conceded to be good as against all the world except the United States, in order that it may confer a title which is no higher or better but manifestly inferior. There

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After referring to Whitney's attempt to "grab" the lands occupied and claimed by Frisbie, which attempt the Court below recognized, Justice MILLER says:

"If there be any principle of law which requires this, the Court must be governed by it, but it is idle to pretend that such a decree would be founded on natural justice" (p. 192).

And in **Atherton vs. Fowler, 96 U. S., 513,** where a pre-emptor of the Whitney type entered upon the possession of Page and cut hay, the same Justice said:

"No law gave them the right to make such an entry; that they were mere naked trespassers upon the enclosure of another—an enclosure and occupation of years, on which time and labor had been expended—and that in such a wrongful attempt to seize the fruits of other men's labor there could be no *bona fide* claim of right whatever" (p. 520).

To the same effect is **The Yosemite Valley Case, 15 Wall., 77.** Justice FIELD, commenting upon the rights of pre-emptors in a case where the land is subject to pre-emption, and all the steps required are complied with, says:

"The United States by those acts (the Pre-emption Acts) enter into no contract with the settler, and incur no obligation to any one that the land accepted by him shall ever be put up for sale. * * * The legislation thus adopted for the benefit of settlers was not intended to deprive Congress of the power to make any other disposition of the lands before they are offered for sale, or appropriate them to any public use. * * * It is the only construction which preserves a wise control in the Government over the public lands."

is no comparison between the respective equities of MOHLER and HOARD. A court of equity will not do a thing so unjust, nor interfere with a title long acquiesced in, when interference is so inequitable.

It certainly was not the intention of Congress, by the act of March 3, 1887, in such a case of this, to set aside and cancel the patent issued to the railway company. Section 4, of the act of March 3, 1887, requires the railway company to pay the Government price for the land, the title being confirmed in its grantee by a second patent. It cannot be contended that the Government can, with one hand, take back the land granted, and, at the same time, with the other hand, collect the full price demanded for it, when absolute title is conveyed.

This act of March 2, 1887, was in force when this suit was brought.

POINT III.

The title of William Hoard, the bona fide grantee of the company by mesne conveyance under the patent sought to be annulled in this case, is absolutely and unconditionally confirmed by the great Remedial Act of Congress of March 2, 1896 (29 Statutes at Large, page 42).

The act of March 2d, 1896, just referrrd to, is reprinted in an APPENDIX to this brief (APPENDIX A). The case at bar is not only within its terms, but within its obvious

and expressed remedial purpose. It provides in express terms in reference to suits brought by the United States to vacate and annul any "patent to lands heretofore erroneously issued under a railroad grant" that **"no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."**

It was pleaded in regular and proper form in this case, with all the requisites of such a plea, that the defendant William Hoard was a *bona fide* purchaser for value (Rec., pp. 9, 22). Proofs were taken and that fact was established without any question (Rec., pp. 59, 60, 61), and it was found by the decree below that he was such purchaser, and on that ground the Circuit Court of Appeals confirmed the decree dismissing the Bill of Complaint of the United States (Rec. p. 94). This was prior to the Act of March 2nd, 1896.

The public and official history of the act of March 2d, 1896, shows incontestably that it was intended to apply to such cases as the present (see APPENDIX B to this Brief). It was specially intended for such cases. Prior to the passage of that act suits had been brought in vast numbers by the United States to cancel and annul patents. Three suits of this character had been brought by the United States against the Union Pacific Railway and about 5,000 of its individual grantees, mostly farmers in actual occupation of the lands in Nebraska, Kansas, Colorado, Utah and elsewhere on the line of its railway. Similar suits against some thousands of grantees had been brought against the Chicago, Burlington & Quincy R. R. Co., and hundreds of similar suits against the grantees of other land grant roads.

Under the act of March 3rd, 1887 (24 Stats., 556), for the adjustment of railroad grants, it was provided in substance that if the Interior Department found that any lands had been erroneously certified or patented, it should make a demand on the company to reconvey, and if such demand was not complied with, that fact should be reported to the Attorney-General, whose duty it was declared by the act to be to bring suits to reclaim the lands to the United States.

The act of Congress of March 3rd, 1891, required the Government to bring said suits within five years of the date of the passage of the act (26 Stats., p. 1099, Sec. 8). The railroad grants being unadjusted and the five years' limitation being about to expire, the President of the United States sent a message to Congress calling attention to that fact and suggesting an extension of time within which the Government might bring suit.

Under these circumstances, a large number of suits were instituted, pursuant to the requirements of the Act of 1887, without any investigation into the *bona fide* character of the holdings of the occupants of the land for want of time and in order to save the Government from being cut off by the five years' Statute of Limitations above mentioned, the time of which was about to expire.

Congress dealt with this subject in the aforesaid Act of March 2nd, 1896. The official report of the Committee and the debates in the House of Representatives on this Act on February 18th, 1896, and on February 19th, 1896, and in the Senate on February 24th, 1896, and in the House on February 24th, 1896, and on February 26th, 1896, show the purpose to confirm and protect by the Act in question every *bona fide* purchaser of land which has been certified,

though erroneously or improperly, by the general Government under any railroad grant (see APPENDIX "B," *infra*). It accordingly made the most liberal provision for the protection of every *bona fide* purchaser of lands which had been patented by the United States to the company as a part of its grant, even though such patents had been erroneously issued. Its purpose was to protect such purchasers and to claim indemnity only against the patentee, the company. To that end this Act twice declares that the title of every "*such bona fide purchaser shall be and is hereby confirmed.*" It contained a new provision to the effect that any such *bona fide* purchaser had a right, prior to any institution of suit by the Government, to come before the Interior Department and establish the *bona fide* character of his purchase and, in this summary and inexpensive way, avoid the cost, delays and perils of litigation.

It does not overstate the case to say that these various suits brought by the Government to cancel patents which it had issued, in many cases nearly a generation before—in the case at bar twenty-two years before—operated as a blight upon large sections of the western states, causing widespread distress and injury. It is difficult to imagine an evil of greater proportions than that of clouded and unsettled titles in a large community or region. These suits effectually prevented alienation of the land; prevented the owner or farmer from using the lands as a means of credit; if subject to mortgage, it prevented his renewal or obtaining of loans, or acquiring the means to improve them. It prevented the settlement and improvement of the country. All was doubt, uncertainty, distress and dismay.

Congress dealt with this pressing situation in the Act of March 2d, 1896, and it dealt with it effectually. As above stated, it twice declared in this act of 1896 that the title of every *bona fide* purchaser under a railroad grant, even though the land was erroneously patented, should be and was thereby confirmed.

Under this act of March 2, 1896, the technical inquiry whether the patent which was issued to the railroad company was void or only voidable is utterly immaterial. In fact, it is obvious that the purpose was to confirm void rather than voidable titles. "They that are whole have no need of the physician; but they that are sick." A title to lands held by a *bona fide* purchaser under a patent voidable as against his railroad grantor if it had kept the land needed no confirmation; such titles were already unassailable under the general doctrines of this Court upholding the title of such purchasers even in suits brought by the Government of the United States. Congress knew this. The report of the debates demonstrates it; and the enactment declaring that no patent to land held by a *bona fide* purchaser shall be affected or annulled, but the right and title of such purchaser is hereby confirmed, related to all patents of public lands issued by the United States under railroad grants. Observe the language: FIRST, an interdict by Congress that "no patent to any lands held by a *bona fide* purchaser shall be affected or annulled;" SECOND, a confirmation clause in this language, to wit: "The right and title of such purchaser is hereby confirmed." The legal effect of this confirmation was to divest all title of the United States to such lands and to confirm the title of the purchase thereto.

EFFECT OF SUCH CONFIRMATION.

"Confirmation," says an eminent writer, "is the approbation or consent to an estate already created, which, *as far as it is in the confirming power*, makes it good and valid. So that the confirmation does not regularly create the estate, yet such words may be mingled in the confirmation *as may create or enlarge an estate*; that is, by the force of such words that are *foreign* to the business of confirmation, and by their own force and power tend to create an estate" (Gilbert's Tenures, 69.)

The confirmation related back to the act confirmed, and was equivalent to original authority. A void grant, even, may be confirmed by the sovereign. The Confirmatory Act operates an estoppel on the United States and that estoppel dates back to the inception of the title.

Seabury *v.* Field, 1 McAllister, U. S. C. C. (Cal.), 1;
Durand *v.* Martin, 120 U. S., 366–371.

The following proposition can not, we think, admit of serious dispute, viz.:

That the confirmation of the title made by the Act of Congress of March 2, 1896, it is in law and legal effect a legal grant of the land as of the date of the patent, and is conclusive from that date as against the United States.

This proposition is not open to any fair question.

Such is the adjudged effect of a confirmation by statute.

The cases of *Chouteau* v. *Eckhart* (2 How., 344), *Les Bois* v. *Bramell* (4 How., 449), and *Landes* v. *Brandt* (10 How., 348), not only adjudge a confirmation to relate back to the original patent or certification, but also adjudge the principle that the confirmation of the right and title of the purchaser is conclusive against the United States and the claimants of the existence of a pre-existing title dating from the date of the patent.

The case of **Landes v. Brant, 10 How., 348, 373,** exhibits the doctrine of relation in the case of a confirmed grant in a very striking way. Washburn's statement of what was decided in this case is so accurate that we quote it. He says:

> "In Landes *v.* Brant, the title in question was an imperfect one, in the original claimant, under the Spanish government; and a creditor of the one holding this title seized and sold his title on execution; and, subsequently to this, the United States confirmed the title to the original claimant. It was held that by relation he was the real owner when the sale was made, and consequently the purchaser under the sheriff's sale held the land against the devisees of the original claimant. The Court quotes from Cruise with approbation, as applicable to such cases: 'There is no rule better founded in law, reason and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation.'"
>
> (3 Washburn on Real Property, p. 587, 5th Ed., top p. 328).

If an ordinary conveyance *en pais* would have such an effect by the doctrine of relation, *a fortiori* how much more so when the confirmation is by an act of Congress which intends to make good from the beginning the acts of Government officials, and to that and confirms *ab origine* the title which its officials undertook to confer. **The legislative act of confirmation oper-**

ates not only as a conveyance but a statute or a law enacted by proper authority declaring the force and effect of such conveyance, which is that the title of the confirmee is made effectual for all intents and purposes from the time of its inception.

In Hoffnagle *v.* Anderson (7 Wheat., 212), the Court says:

"It is not doubted that a patent appropriates land. Any defects in the preliminary steps which are required by law are cured by the patent. It is a title from its date, *and has always been held conclusive against all those whose rights did not commence previous to its emanation.*" (Approved in Spencer *v.* Lapsley, 20 How., 272.)

"'The *confirmor* (under Blackstone's definition, 2 Bl., 325), or those claiming under him, would not be permitted to deny the pre-existing title in the *confirmee.* The confirmor, or those claiming under him, would be estopped by his deed.'" (Moore *v.* Hill, 1 Breese, 236; S. C., 1 Ill., 304, pp. 313, 316; approved by the Supreme Court of Illinois, 33 Ill., 439; and by the Supreme Court of the United States in Reichart *v.* Felps, 6 Wall., 160, 165.)

"In the case of **Choteau v. Eckhart, 2 How., 345.** Congress by an act passed June 13, 1812, confirmed to the inhabitants of certain towns in the Louisiana Purchase their rights and titles to certain lands and commons in and adjoining the same. The action was ejectment; the defendant claimed title under the act of 1812, and the plaintiff claimed title under a concession made by the Spanish Government, which was confirmed by Congress in 1836. It was thus a case of claims for title under conflicting confirmations. The case of **Les Bois v. Bramell, 4 How., 449,** was a similar case.

"'The only question,' says CATRON, J., in the subsequent case of **Landes v. Brant, 10 How., 348,** 'decided in Choteau *v.* Eckhart, 2 How., 345, and in Les Bois *v.* Bramell, 4 *ibid*, 449., was, that when Congress confirmed and completed an imperfect claim and then confirmed another and different claim for the same land, the older confirmation defeated the younger

one; nor could a court of justice go behind the first confirmation and ascertain from facts and title papers which claimant had the better original equity. That if this was allowed then the first confirmation could be overthrown by the courts, and the action of the political department (in all cases of double confirmation) would have no conclusive force when the courts were resorted to.'

"Now, in the case of Chotean *v.* Eckhart, *supra*, although the plaintiff's confirmation by the act of 1836 was held to be void and ineffectual, because of the prior confirmation under the act of 1812, yet the court says (and that is applicable to the present case):

"'That the plaintiff's title is *prima facie* a good legal title, and will support an ejectment under the act of 1836, standing alone, if the land can be identified and confirmed without resort to the patent. **This Court held in Strother v. Lucas, 12 Peters, 410, "that a grant may be made by a law as well as by a patent pursuant to a law, is undoubted, and a confirmation by law is as fully to all intents and purposes a grant, as if contained in terms a grant de novo."'"**

This principle as to the conclusive and retroactive effect of the Confirmatory Act has an important bearing on the rights of the parties, for it must be remembered that the act of March 2, 1896, is more than a mere conveyance by way of confirmation. *It is a* LAW *as well as a conveyance* (Ryan *v.* Carter, 93 U. S., 78, 82; Langdeau *v.* Hanes, 21 Wall., 521, 529; Tripp *v.* Spring, 5 Sawyer, 209, 216, FIELD, J.).

The consequence is that the patenting of these lands, being confirmed by Act of Congress, *has the same force and effect as if authorized by the original granting act.*

But whether the confirmation relates back and vests a perfect title as of the date of the patenting or not, it at least vests such title in Hoard as soon as the Act of March 2, 1896, took effect.

The United States, therefore, by the Act of March 2nd, 1896, confirming the title of bona fide purchasers, has settled the controversy in the present case, and as this fact is shown to this Court by said act and by the record in this cause, the appeal of the United States should be dismissed.

It is well settled by numerous decisions of this court that when a controversy between the parties has been settled by them out of court, a showing of such settlement may be made to this court at any time before its decision is rendered, and the writ of error or appeal will thereupon be dismissed. We need refer only to the following cases:

Dakota County vs. Glidden, 113 U. S., 222.
Elwell vs. Fosdick, 134 U. S., 500, 513.
Little vs. Bowers, 134 U. S., 547.
California vs. Sam Padlo, &c., R. R. Co., 149 U. S., 308, and cases cited at page 314.

The only person or party who has or asserts any title or interest in the land in question in this case as against William Hoard, the *bona fide* purchaser and present owner and occupant of said land, is the United States. But the United States, by the Act of Congress of March 2, 1896, has confirmed the title of William Hoard as such *bona fide* purchaser, and such confirmation has ended all controversy in regard to the title of the land, and vested and confirmed that title in him as such purchaser. This confirmation by the Act of March 2, 1896, was as valid for this purpose as a specific release or conveyance would have been, since it is well settled that Congress may make a grant of lands

directly by statute, just as well as indirectly through a patent issued by the officers of the Interior Depart- Department. If a specific grant or release had been made under authority of an Act of Congress we could bring that grant or release into this court, and, on the authority of the decisions above referred to, have the benefit thereof, and have the appeal dismissed.

There is no difficulty in the application of that principle to the present case since the issue of *bona fide* purchaser was made in this cause in the Circuit Court, and the fact of such *bona fide* purchaser was established by the proofs, and so decided both by the Circuit Court and the Circuit Court of Appeals. The result is that the *bona fide* purchaser in this case was and is entitled, under the express provision of the Act of March 2d, 1896, to have this bill which was brought to annul his title dismissed; in fact, the Court is forbidden, by this act, to enter any decree vacating or annulling it. So liberal are the provisions of this act that it allows the original patentee, by the third section, to make the claim, *on behalf of its bona fide purchasers*, that it has sold the land *bona fide*, and the provision is that that title shall be confirmed, and if such suit is brought by the United States the purchaser is entitled to have a decree of confirmation if he asks it.

The only right reserved to the United States is that specified in the second and third sections of the act, namely, that the government, through the Secretary of the Interior, may request that suit be brought against the patentee corporation or company, for whose benefit the certification or patent was made, for the value of the land, which, it is enacted, shall not in any case be more than the minimum price thereof,

and that the title of such claimant shall stand confirmed; and the same provisions are repeated in section 3, namely, that the Secretary of the Interior shall request that suit be brought against such patentee and corporation or company for whose benefit the patent was issued or certification made for the value of the land as hereinbefore specified. It directs suit for the value, but it is noticeable that it does not declare or enact that the company is liable. That is left to judicial determination. This is not such a suit, and therefore the proper decree to be entered is either one dismissing the appeal or one affirming the decree dismissing the bill, possibly with the provision (if the Court thinks such provision expedient and proper) that such dismissal shall be without prejudice to the United States bringing suit for the value of the land in controversy. What defenses the original patentee has or may have on such issue were not presented in this suit, and do not, of course, appear in this record.

No decree has at any time been entered in this case adjudging these lands to the United States. On the contrary, both the decree of the Circuit Court and that of the Circuit Court of Appeals affirming the same decided that the United States was not entitled to the lands. If this decree of the Circuit of Appeals were reversed, this Court would, under the circumstances, have to remit the case to the Circuit Court for further proceedings. In that event, Hoard, the grantee of the company, would be entitled to have the protection of the Act of March 2d, 1896, which forbids the entry of any decree against him; and therefore it clearly appears that the only proper decree of this court is one dismissing the appeal, or one affirming the decree of the Circuit Court of Appeals with possibly a reser-

vation of the rights of the United States as against the Railroad Company to bring suit for the value of the land.

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Of Counsel for said Defendants Union Pacific Railway Company and William Hoard.

APPENDIX A.

An Act To provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes.

[29 Stat., 42.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: *Provided*, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.

SEC. 2. That if any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or

association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum Government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons for whose benefit the certification was made for the value of the land as hereinbefore provided. Any *bona fide* purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such *bona fide* purchaser in any United States court having jurisdiction of the subject-matter, or at his option, as prescribed in sections three and four of chapter three hundred and seventy-six of the Acts of the second session of the Forty-ninth Congress.

SEC. 3. That if at any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a *bona fide* purchaser or are *bona fide* purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a bona fide purchaser as aforesaid, or that such persons or corporations are such bona fide purchasers, then no such suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee,

or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified.

Approved, March 2, 1896.

APPENDIX B.

Congressional History of Confirmatory Act of March 2, 1896.

The official proceedings in connection with the Act of March 2, 1896, will be found in the "Congressional Record," A. D. 1896, pages 1933–1939, 2085–2087, 2129–2134, 2336, 2337, 2451–2454.

The report presented to the House by Mr. LACEY on behalf of the Committee on Public Lands, is as follows:

Mr. LACEY. Mr. Speaker, I ask for the present consideration of this bill.

The report (by Mr. LACEY) was read, as follows:

On the 17th day of January, 1896, the President sent to Congress a message in relation to the expiration of the limitation provided in the act of March 3, 1891. Under the act of March 3, 1887 (24 Stat. L., 356), the Interior Department was directed to adjust all the various railway and other land grants as speedily as practicable, and whenever it was ascertained that lands had been erroneously patented the law provided that actions should be brought to cancel the same.

Provisions are embraced in the act of 1887 to protect settlers and purchasers by giving them preferential rights in case of the cancellation of their patents.

These proceedings of necessity caused much disturbance among land titles, and although the purpose involved was the laudable one of protecting the Government by correcting mistakes and overturning fraud-

ulent patents, a sense of insecurity and loss of confidence in the integrity of patent titles became a serious drawback to the settlement and improvement of some parts of the country.

In order that all these questions might be speedily adjusted, and that any proposed litigation for the purpose of annulling patent titles should be promptly brought, the limitation act of 1891 was passed, requiring that all such suits as to patents already issued should be commenced within five years, or prior to March 3, 1896, and that as to patents subsequently issued, suits to cancel the same should be brought within six years after the date of the patent.

The Commissioner of the Land Office, on the 18th of December, 1895, addressed a communication to the Secretary of the Interior, suggesting an extension of time by amendment to the act of 1891. The Secretary of the Interior communicated with the President upon the subject, recommending the repeal of the limitation altogether. Thereupon the President sent a message on the subject to Congress, asking for a repeal of section 8 of the act of March 3, 1891.

We will set out in an appendix to this report the message and other communications above referred to.

The Committee on the Public Lands have patiently examined the whole subject and invited before them all persons interested in the question, as also the Assistant Attorney-General for the Department of the Interior and the Commissioner of the General Land Office.

There has been a large variety of land grants which will be affected by the proposed extension of the limitation. The Commissioners of the General Land Office was of the opinion that it would require ten years more to adjust the grant under the act of 1887, and therefore thought the limitation should be extended ten years.

In the adjustment of these grants it is not practicable for more than from two to four clerks in the General Land Office to work at one time without having duplicates made of certain lists or records. With this small force the adjustment has slowly proceeded for the last nine years, and over 60,000,000 acres still remain unadjusted. It appears, however, that by active diligence about 12,000,000 acres have been adjusted in the last year. At this rate the work could be completed in five years more.

But even if it could not be done with the present force, the committee are of the opinion that duplicate copies of lists and documents or records ought to be made to expedite this work, and that the time ought not to be extended more than five years.

While it is important that the rights of the Government should be cared for, and that a reasonable time for adjustment of these patented grants should be given, it is also of the highest importance that the validity of the Government patents should be examined as speedily as practicable so that former settlers and those who wish to become settlers or purchasers of these lands may know that the Government patent issued by the highest authority of the nation shall be evidence of a final and complete character that the Government's title has been lawfully transferred.

Under existing law, and in the absence of any limitation, a settler may buy a home upon one of these grants, and after occupying it for years, under the faith of a patent regularly issued and recorded, find himself made a party to a long, vexatious and expensive litigation, and in the end be permitted to buy the land again from the Government or to enter it under the homestead laws.

That such a thing may occur for a reasonable time is perhaps the necessary consequence of fraud and mistake in patents, but that such a condition should be kept open without limit is an intolerable blemish upon the titles purporting to come from the Government. If a private individual sells and conveys lands, and they pass into innocent hands, the purchaser is protected as against his grantor, and time will protect him against all comers. But as against the United States, in the absence of a limitation law, he is never secure and may be subjected to annoyance and expense and possible loss of his land at any time.

A private individual may have obtained a patent for a homestead, tree claim, or pre-emption claim, and after selling the same the purchaser, who has bought upon the faith of the Government patent, may be harassed by proceedings in the courts hundreds of miles away, with a possible appeal to the expensive forms of the court of appeals, and the still more expensive and clogged tribunal of the United States Supreme Court.

To remedy these defects the act of 1891 was enacted. On account of the large land grants involved, and the fact that it has not been found practicable to adjust

them within a short time, we think that a bill giving five years' longer limitation ought to pass, but we do not believe that the extension of time ought to affect *bona fide* purchasers; that as to them the limitation of the act of 1891 ought to operate as a final bar when the first time limited shall expire.

But as to the original patentees, no great injustice will be done to them by extending the time five years longer, and within that time we think that the grants may be all adjusted. The shortness of this time, it is true, may put the Interior Department to some inconvenience, and it may involve some extra expense for clerical work, but the importance of bringing to an end all disputes upon the part of the Government as against its own patent titles is so evident as to need but little argument in its support.

Your committee have prepared and presented a bill which will carry out the purposes outlined in this report, and we recommend its passage.

We can not agree with the President that public policy requires that there shall be no limitation as against the Government in these cases.

We have had unpleasant object lessons in many of the Spanish grants, whose limits are as elastic and uncertain as the Venezuelan boundary. The presence of these disputed titles has cast a blight over some of our most beautiful lands for more than a generation. There should be some time fixed when such a condition shall cease to exist.

The limitation may perfect titles in some instances founded in more or less of fraud or mistake. So it happens with all such statutes, but universal experience has demonstrated the necessity of such statutes.

Most of the States of the Union have adopted statutes which will bind the States themselves. Such statutes have been found to work well. To require the sovereign power to proceed in a reasonable time if it wishes to avoid or nullify its own acts is a just provision in behalf of its individual citizens. The absence of limitation excuses delays on the part of officials, and that which may be done at any time, however distant in the future, is much less likely to be attended to in the present.

We are informed that as to some of these land grants the greater part that has been patented has been sold to third persons. That was the very purpose of the land grants. It was not intended that these grants in

aid of public improvements should be tied up indefinitely and withheld from settlement.

It was the theory of the projectorso f such enterprises that these lands would be brought into markets by the building of railways and that the railway companies would be interested in selling them on long time at low prices and at low rates of interest to actual settlers who would furnish a carrying business for the new lines. It ought not to be the policy of the Government to harass or annoy one of these settlers by any litigation whatever.

The policy of making railway grants has been long since abandoned. The adjustment of those made should proceed with all reasonable speed, so that the transactions may be closed.

The railway companies themselves have encouraged delay by failing to procure their patents, in order to avoid local taxation. One of the purposes of the act of 1891 was to encourage the patenting of such lands, so that they might become subject to such taxation, and that their sale and settlement might be encouraged.

The bill which the committee presents with this report is as follows:

[Here follows Copy of Bill.]

MR. LACEY, among other things said to the House in explanation of the bill, as follows:

As to the settlers now on the lands, we report that the individual settlers or purchasers who have bought land from the railroad companies and other parties, and who are innocent holders of land, should not be disturbed, and that the limitation of the act of 1891 shall be absolute after the 3d day of March next.

There are in California, in Kansas, in Nebraska, and in other States very considerable quantities of these lands which have passed into the hands of innocent holders, and they are protected by the bill in its present form. I now yield ten minutes to the gentleman from Arkansas (Mr. MCRAE).

MR. HARTMAN. Before the gentleman does that, I want to ask him a question. I am interested in this bill, as he is, and I favor the bill. There is only one thing about it that I want to ask his judgment upon. Commencing in line 12 of page 1, and ending on line 15, page 2, the following language occurrs in the bill:

But no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed.

Now, in many instances purchasers of these lands have bought them prior to the issuance of the patent by the Government to the railroad company. I want to know whether their rights will in any way be affected by the provisions of this bill? To illustrate my point, I will say that there are now in the neighborhood of 2,000 men in the State that I represent here who are *bona fide* purchasers of Northern Pacific Railroad lands. They have taken them in good faith, made a partial payment, bought them on the five and ten year contract plan. They have made partial payments on those lands, and have gone into possession, and made improvements. Now, what I want to know is, will their rights be entirely preserved by this bill? If not, I desire to have it amended so they will.

Mr. LACEY. It seems to me there is no question about that, as to settlers who buy the land from railroad companies having lands granted to them by acts of Congress. After a settler buys a patent is issued to the railroad company. That patent at once insures to the benefit of the purchaser, and he having bought the land and subsequently held it in good faith would be protected by the provisions of this bill. That was the intention of the bill. I think it is fully broad enough to cover it. In addition to that, sections 3 and 4 have been added, giving opportunities for the settler to have his title confirmed in the Department of the Interior. But we have in the closing words of this first section provided expressly that the title of *bona fide* settlers is not only protected by the limitation, but it is affirmatively confirmed by the act itself.

In the debates on February 18, 1896, Mr. HEPBURN, from Iowa, who said his constituents were largely interested in the bill observed (Con. Record, pp. 2086, 2087):

Mr. Speaker, in the district in which I live there are at least 200,000 acres of land granted to the State of Iowa to aid in the construction of railroads, nearly forty years ago. This land grant was adjusted and the certification made in 1859. Thirty-seven years have

elapsed since the corporation taking under this grant from the State became the owner of these lands. Every acre of this land was sold many years ago, and is now in the hands of settlers—of farmers. In my judgment this bill, notwithstanding the opinions that have been presented here by some gentlemen, does disturb this class and throws a cloud upon every one of these titles.

It is true that there is a clause in this bill whereby at the end of litigation or by filing evidence of the title of the new holder he may not be seriously disturbed. But no one of all these settlers knows what particular tract of land will be selected by the Secretary of the Interior under the act of 1857 as the subject of litigation. Every man's land is clouded with the thought, with the certainty, that the Secretary of the Interior may institute a suit against him. He may be conscious of his ability to defend himself, but he does not want to go to a Federal court, possibly 100 or more miles away, into a community in which he is a stranger, and there make his defense. He cannot do it without incurring expense.

Now, Mr. Speaker, this is a matter of importance. Only a week ago one of my clients wrote to me that, under the act of 1887, although he had his certificate, his duplicate—which, under the laws of the State of Iowa, is all the evidence of title that he needs—although he has held that for more than forty years, he has recently been notified by the Department that under the readjustment of that Department, going over the old entries, they have discovered that his land was within the limits of a railroad, and was double-minimum rather than single-minimum land. On those lands he had located a Mexican land warrant, paying the difference for the fractional quarter. He was notified of the annulment of his patent, and required to pay the additional sum that would make the aggregate of the double-minimum price, after forty years. I say that is not right, and that there ought to be a statute of limitations that would be a bar against the Government as against individuals.

There is no reason why the officers may be negligent for forty years and then at the end of that time come upon a purchaser, as in this case, not the original purchaser, and require the new owner to make this payment. The other man is dead and gone long ago and his estate has been settled, so there is no possible redress for the present holder. It is not right or proper.

The gentleman from Arkansas [Mr. McRAE], in a speech that he made to this House the other day, told the House that the Statute of 1887—to be continued in its operation by this act—was a statute for the recovery of lands fraudulently obtained from the Government. I have taken occasion to make inquiry, and I find that in all of the adjustments in every case where the company has been required, under the provisions of the act of 1887, to make reconveyance, in not a single instance has there been an allegation of fraud.

These cases do not arise even from any mistake of fact. There is neither mistake of fact nor fraud involved in this. They grow out of the changes of construction by the officers to-day differing from those of the officers of twenty, thirty, or forty years ago. For instance, years ago the Department held that in case of a fraudulent preemption, or where a preemption had been abandoned, the preemption entry did not serve to extract the land from the operation of the donating statutes. Under that, in cases of that kind, where the preemption filing had been made, but abandoned, or shown in contest to be fraudulent, the lands were certified to the State, and from the State of Iowa to the railway company. The Department has recently changed that ruling, perhaps under a late decision of the Supreme Court, which holds that that kind of an entry did serve the office of extracting those particular lands from the operation of the granting statute.

Although these lands were long ago certified to the company, although they have sold them, now they require the company to reconvey the lands conveyed to them long ago, which requires the holder of those lands to show that he is at present a *bona fide* holder in order to prevent the institution of suits against him, and in failure of that, requires him to go to a distant court to make defense to show that he is a *bona fide* holder. I do not believe that there is any justice in that. * * * *

Now, Mr. Speaker, these lands are patented and have been occupied for thirty or forty years. There is no reason or justice why repose should not be given by statute to all of these titles. If we simply allow time to pass, repose will be given to every one of them on the 3d day of next March, and no one of these settlers can be disturbed. In some of the proposed suits, I learned from the district attorney of the district in which I live, it will be necessary in carrying out the provisions of the act of 1887 to make 2,000 people de-

fendants to these suits. Two thousand people! In these particular cases, when it is all done, what boots it to the Government? It is a conflict between the beneficiaries of two grants.

In the proceedings in the Senate on February 24, 1896, Mr. BERRY said:

MR. BERRY: I will state to the Senator from Florida [Mr. Call] that in 1891 Congress passed an act requiring that all suits brought by the Government to annul patents should be brought within five years. That time will expire on the 3d day of the coming month, March. While the Land Office has done all that it has been possible to do to bring those suits within that time, it has been unable to bring all the suits that the officials believe should be brought, and the President of the United States called the attention of Congress to the matter, recommending that the law be repealed or at least the limit extended.

The other House has passed the pending bill. *It sought in it to protect all innocent purchasers, bona fide purchasers, so as not to subject them to suits by the Government.* The bill extends for five years the time within which the Government may bring suit to set aside any of the grants to the various railroad corporations of the country where the lands are still under the control or in the possession of the railroad company. That is the object and the purpose of the bill. There are a number of details by which innocent purchasers may apply to the Secretary of the Interior and have their titles confirmed where there is shown to be any question.

Now, I will state frankly that I should have preferred to repeal the act of 1891 out and out, and leave no question whatever. But that is impossible. This is a House bill, and it is this or nothing. If the pending bill is not passed and signed by the President before next Monday the limitation enacted in 1891 will have attached and it will be claimed, at least, whether it is the law or not, that the title, however fraudulent it may be, to the railroads will be confirmed. I think it is absolutely important that the bill should be passed and passed this evening, and so think all the other members of the Committee on Public Lands.

The bill was reported to the Senate as amended, and the amendments were concurred in.

APPENDIX C.

History of conflicting rulings and decisions of the Interior Department relating to the effect of a fraudulent pre-emption claim or homestead entry.

June 22, 1866. MR. HARLAN, Secretary of the Interior, decided that if a homestead or pre-emption claim is abandoned or forfeited, the railroad grant immediately attaches.

Secretary HARLAN'S *Decision.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, June 22, 1866.

The Commissioner of the General Land Office:

SIR—I have received your letter inclosing instructions which you propose to issue to the register and receiver at Dakotah City, Nebraska, in regard to pre-emption and homestead settlers upon odd sections within the limits of the grant for the Burlington and Missouri River Railroad, and also enclosing a letter from Henry Beard, Esq., bearing on the same subject.

The homestead settlers' right attaches only from the date of entry, the pre-emptor's from the date of his actual personal settlement. The title in either case is consummated by a full compliance with the terms and conditions imposed by law.

The grant to said company [see § 19, Act July 2, 1864], does not embrace lands to which a valid right arising either under the homestead or pre-emption law had previously attached, *but if such right be abandoned or forfeited, the grant would immediately thereafter take effect.* A pre-emptor cannot abandon his claim as such, or transmute it to a homestead entry so as to defeat the right of the company, which inured before such entry be made.

If a pre-emption settlement had been commenced upon surveyed land, the latter might be entered as a

homestead before the right of the company atttached, but not at a subsequent date.

With these modifications of your instructions they are approved, and with Mr. Beard's letter, return herewith.

I am sir, very respectfully your obedient servant,

JAMES HARLAN,
Secretary.

THIS RULING was reported to Congress, in 1866, in the amended report of Commissioner General Land Office, p. 19.

November, 3, 1866, Secretary BROWNING decided the same way.

Secretary BROWNING'S *Decision.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C. November 3, 1866.

SIR—I have received and considered the papers accompanying your letter of the 24th ultimo, transmitting the appeal of W. A. Gorman, Esq., attorney for plaintiff, from your decision in the case of Frank Pickler, Homestead Entry No. 2862, St. Peter, Minn., Series.

It appears that Pickler, on the 2d June, 1857, filed a declaratory statement of his intention to enter as a preemption the tract in question (southwest quarter of Sec. 17, Tp. 111, R. 23, Minnesota), but failed to prove up and pay for the land as required by notice attached to proclamation No. 664, of July 7, 1860. The tract being part of an odd-numbered section within the fifteen-mile limits of the Minnesota Valley Railroad, on Pickler's forfeiture thereof, the title thereto vested in the company, as fully and effectually as if his right had never attached. His subsequent homestead entry was accordingly canceled, as the land had been certified to the State for the benefit of the company, and was, therefore, not unappropriated public land.

Whatever might have been my opinion on the subject as an original question, it seems to have been settled by the repeated rulings of your office, which I am not inclined now to disturb.

Your decision is affirmed and the papers are returned.

I am, sir, very respectfully,
Your obedient servant,
O. H. BROWNING,
Secretary.

The Commissioner of the General Land Office.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., October 24, 1866.

HON. O. H. BROWNING,
Secretary of the Interior:

SIR—I have the honor to submit herewith the appeal of W. A. Gorman, Esq., attorney for plaintiff, from the decision of this office in the case of Frank Pickler's Homestead Entry No. 2862, St. Peter's Series, said entry having been canceled for conflicting with the claim of the Southern Minnesota, now Minnesota Valley Railroad Company, as shown by our letter to the local officers, a copy of which is herewith enclosed, marked A.

This cancellation is in conformity with a principle which has always governed the action of this office in such cases, &c. * * *

Very respectfully,
JOS. S. WILSON,
Commissioner.

June 25, 1867, Acting Secretary OTTO made the same ruling.

Acting Secretary OTTO'S *Decision.*

EXTRACTS FROM THE DECISION IN LABAN LANGLEY'S CASE.

[June 25, 1867.]

"Two of Langley's witnesses swear that he told them in January and March, 1865, he was going to claim this land (lots 1 and 2 and S. ½ N. W. ¼ of Sec. 35, Tp. 6 S., R. 2 W., Mt. D. M., California,) as a pre-emption. * * * "Such declarations go for naught, in the absence of those corresponding acts requisite to the establishment of a pre-emption, such as the building of

a dwelling house and outbuildings, or the legal appropriation of the same to the settler's own use, with the improvement of the land to such an extent as would show an honest intention to claim the benefits, and avail himself of the privileges of the pre-emption laws."

"Those elements seem to be wanting in this case. The absence of such improvements of his own or their legal appropriation to his own use prior to the intervention of the railroad right, must be fatal to Langley's claim.

"The proviso in the 4th section of said act of July 2 1864, excepts from the Pacific Railroad grant only lawful claims."

The rejection of the claim of Laban Langley is affirmed.

Very respectfully, your obedient servant,

W. T. OTTO,
Acting Secretary.

HON. JOS. S. WILSON,
Commissioner of the General Land Office.

November 22, 1867, Mr. Secretary BROWNING gave an elaborate opinion to the same effect as Secretary HARLAN'S.

Secretary BROWNING'S *Opinion:*

DEPARTMENT OF THE INTERIOR.
WASHINGTON, D. C., Nov. 22, 1867.

SIR—I have received your letter of the 13th July last, submitting on appeal the papers in the case of Caswell L. Conner vs. The Central Pacific Railroad Company of California, from the Marysville Office, California, the tract in controversy being the Northeast Quarter, Sec. 15, T. 8 N., R. 5 East.

Conner appeals from your decision of March 12, 1867, rejecting his pre-emption claim.

It appears from the papers that Conner first commenced improvements on the land in 1858; that in January, 1862, he first resided thereon. In April or May of the latter year, Conner moved away and did not return to the land with his family until February, 1864, at which date this township had not been surveyed. On the 22d of April, 1865, the township plat was approved, and on the 8th of May following it was filed in the local office.

A withdrawal of lands was ordered on account of this railroad, August 2, 1862, to take effect from the date of the receipt of the order at the local office; said order was received there September 12, 1862. The effect of the withdrawal as applicable to *unsurveyed* lands is at issue, and the attorneys of the railroad company argue that the withdrawal took effect, within the specified limits, upon the *unsurveyed* as well as upon the surveyed land, from September 12, 1862.

The third section of the act entitled, "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, &c., approved July 1, 1862 (12 Stat., 492), grants: "Every "alternate section of public land, designated by odd "numbers, to the amount of *five alternate sections per* "*mile* on each side of said railroad, on the line thereof, "and within the *limits of ten miles* on each side of "said road, not sold, reserved, or otherwise disposed "of by the United States, and to which a pre-emption "or homestead claim may not have attached, at the "time the line of said road is definitely fixed," with a proviso excepting all mineral lands.

The seventh section of this act provides "that within "*two* years after the passage of this act, the said com- "pany shall designate the general route of said road, "as near as may be, and shall file a map of the same "in the Department of the Interior, whereupon the "Secretary of the Interior shall cause the lands within "*fifteen* miles of said designated route or routes to be "withdrawn from pre-emption, private entry and "sale; and, when any portion of said route shall be "finally located, the Secretary of the Interior shall "cause the said lands hereinbefore granted to be sur- "veyed and set off as fast as may be necessary for the "purpose herein named."

The foregoing provisions leave not the least doubt that Congress understood the grant to be *unsurveyed* as well as surveyed lands traversed by the route of the road. There is as little doubt that all the lands, both of the even and odd numbered sections of surveyed lands, and all unsurveyed lands for 15 miles on each side of the route, being five miles more on each side of the road than the extent of the grant, were, by the order to the local land officers before mentioned, absolutely withdrawn from pre-emption, private entry and sale.

At the time of the passage of this act, the unsurveyed lands which are now the subject of discussion were open to pre-emption settlements, but by the terms of this act they were, to the extent mentioned in said act, to be withdrawn from further liability to such appropriation. No distinction is made in the grant between surveyed and unsurveyed lands. Neither of them are thereafter subject to settlement under the pre-emption laws.

The fourth section of the amendatory act of July 2, 1864 (13 Stat., 358), enlarges the grant, and then provides that "any lands granted by this act, or the act "to which this is an amendment, shall not defeat or "impair any pre-emption, homestead, swamp land or "other lawful claim, nor include any government reser-"vation or mineral lands, or the improvements of any "*bona fide* settler," &c.

This evidently has reference only to such pre-emption and homestead rights and other lawful claims as may exist, when the right of the road attaches, and not to such as may arise afterwards. *The object of the provision was to prevent the road from displacing the pre-acquired rights of others, and not to enable others to displace the pre-acquired rights of the road.*

The public domain is at the absolute disposal of Congress, and that body can grant away the unsurveyed as well as the surveyed lands. The intention to do so in the case of the Pacific Railroads is clear beyond doubt, and we must execute the law as we find it.

There is no more reason to suppose it to have been the intention to continue to the public the right to settle under the pre-emption laws on unsurveyed than surveyed lands. In neither case can it be done after the road has filed a map of its route, and notice has been given to the local officers to withdraw or withhold the lands.

Any other construction might go far towards defeating the objects of the grant, and would deny any effect whatever to the provisions of the Pacific Railroad laws, which direct the unsurveyed lands to be withdrawn.

This gives full effect to all parts of those laws without at all interfering with the proper operation of the pre-emption laws. They all have a proper subject matter to act upon, and under this construction can be executed in entire harmony with each other.

Your decision is affirmed. The papers are herewith returned.

Very respectfully, your obedient servant.

O. H. BROWNING,
Secretary.

HON. JOS. S. WILSON,
Commissioner of the General Land Office.

This construction remained until April 28, 1871, when Secretary DELANO changed it in a case under Sec. 19, Act July 2, 1864, and in 1878 Mr. Secretary SCHURZ overruled the doctrine of 1871, and under Secretary TELLER'S decision the question was again oscillating.

Judicial Construction at Time the Patent Issued.

The construction of the act given by Secretary HARLAN and by Secretary BROWNING, as above shown, was adopted and held to be sound by the Circuit Court of the United States for the District of Nebraska, in the case of the *Union Pacific Railroad Company vs. Watts*, 2 Dillon, 310 (DILLON and DUNDY, JJ.), wherein it was held that the exception of lands to which homestead claims had attached at the time of the railroad was definitely located did not operate in favor of the sham and fraudulent homestead claim, obviously on the principle that the provision was to protect *bona fide* claimants, not to enable sham pre-emption or homestead claimants to displace the pre-acquired rights of the railroad company under the land grant. This decision, which was never appealed from, was made in 1873, the year before the patent in this case was issued.

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 218.

THE UNITED STATES,
Appellant,

vs.

THE UNION PACIFIC RAILWAY COMPANY, HENRY CAM-
M. J. WELLSLOGER and WILLIAM HOARD.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

BRIEF IN REPLY FOR THE RAILWAY COMPANY AND WILLIAM HOARD.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON AND
T. F. GARVER,
Of Counsel for the Railway Company and William Hoard.

C. C. Burlingame, 120 William and Cedar Sts., N. Y.—1892.

Your decision is affirmed. The papers are herewith returned.

Very respectfully, your obedient servant,

O. H. BROWNING,
Secretary.

HON. JOS. S. WILSON,
Commissioner of the General Land Office.

This construction remained until April 28, 1871, when Secretary DELANO changed it in a case under Sec. 19, Act July 2, 1864, and in 1878 Mr. Secretary SCHURZ overruled the doctrine of 1871, and under Secretary TELLER's decision the question was again oscillating.

Judicial Construction at Time the Patent Issued.

The construction of the act given by Secretary HARLAN and by Secretary BROWNING, as above shown, was adopted and held to be sound by the Circuit Court of the United States for the District of Nebraska, in the case of the *Union Pacific Railroad Company vs. Watts*, 2 Dillon, 310 (DILLON and DUNDY, JJ.), wherein it was held that the exception of lands to which homestead claims had attached at the time of the railroad was definitely located did not operate in favor of the sham and fraudulent homestead claim, obviously on the principle that the provision was to protect *bona fide* claimants, not to enable sham pre-emption or homestead claimants to displace the pre-acquired rights of the railroad company under the land grant. This decision, which was never appealed from, was made in 1873, the year before the patent in this case was issued.

165-482

NOV 30 1896

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 319.

THE UNITED STATES,
Appellant,
vs.
THE UNION PACIFIC RAILWAY COMPANY, HENRY GAY, M. J. WELLSLOGER and WILLIAM HOARD.

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C. G. Burgoyne, cor. Walker and Centre Sts., N. Y.—1896.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF IN REPLY FOR THE RAILWAY COMPANY AND WILLIAM HOARD.

Since the filing of our original brief we have seen the brief of the Solicitor-General in cases Nos. 321 and 322, which we had not seen at the time when our main brief was prepared.

The fundamental position of the Solicitor-General *(see brief in No. 321 and No. 322, pp. 12, 13)* is that the certification or patenting of the land, after home-

stead and pre-emption rights had attached thereto, was an act not merely voidable, but absolutely void, because control over and power of disposition of said lands by the Interior Department had ceased. Also (*see same brief, p. 24*) that, by reason of such patents being absolutely void, it is legally impossible that the grantees of the patentee can occupy the position of purchasers for value without notice.

I.

The claim of the Solicitor-General is that a pre-emption filing, no matter how sham and fraudulent, that is, as in the case now at bar, made by a person without ever having settled upon or improved the land, and who abandoned even the paper filing, has the effect not only to except the land thus filed upon from the railroad grant, but also to withdraw the same from the general power and jurisdiction of the Secretary of the Interior so effectually that, if, afterwards, in due course of proceeding, he issues a patent therefor to the railroad company, such patent is absolutely null and void, not merely voidable, but utterly void.

If the premises are sound, the same result would follow if the Interior Department patented the land to anybody else—the proposition of the Solicitor-General being that the subject-matter is wholly withdrawn from the jurisdiction of the Interior Department by a fictitious or fraudulent filing.

We maintain that this Court never has decided that where, as in the case at bar, the pre-emption filing was

a sham and a fraud by reason of the fact that the person making the filing *never made any settlement or improvement upon the land, and never entered thereupon*, and where his unsworn statement, which constitutes the filing, was a falsehood, and where he never set up any claim under it, and where he allowed the filing to expire without doing anything upon the land—we say that this Court never has decided that such a filing will operate to except the land filed upon from the grant. We submit that *such* a filing can have no such effect.

The proposition which we here combat is supposed by the Solicitor-General to have been determined in *Kansas Pacific Railway Company vs. Dunmeyer*, 113 U. S., 629; *Hastings and Dakota Railway Company vs. Whitney*, 132 U. S., 357, and *Whitney vs. Taylor*, 158 U. S., 85. When those cases are examined critically, it will be found that no such question was determined. They either relate to homestead entries, which had been followed by patent, or to a live and actual pre-emption filing, *which was accompanied by settlement upon the lands*, and which was subsisting at the date when the line of railroad was definitely fixed.

In the case of *Whitney vs. Taylor*, 158 U. S. 85, cited *supra*, the fact was (p. 88):

"That Jones, from the time that he alleged settlement, in 1854, up to about 1859, cut some hay off from about four acres of the land in controversy, which he had enclosed with a brush fence. Jones cut off the brush on the ground in controversy to enable him to make the fence. At that time the country was open and Jones pastured his cattle and sheep on the land in controversy, as well as over the surrounding country, but he never settled upon the land in controversy. He lived on Section 4 adjoining."

Referring to this matter the Court said (p. 96) :

" The acceptance of the declaratory statement by the local land officers is *prima facie* evidence that they have approved it as a *bona fide* application, and if, in any particular instance, it is shown to be purely fictitious, *doubtless there is an adequate remedy by proper proceedings in the Land Office.* There is in the case before us no pretense that the transaction was a fictitious one, or carried on otherwise than in perfect good faith on the part of the applicant."

In the case now at bar, on inquiry duly instituted in the department, in a proceeding to which both Elder and Mohler were parties, it was found and decided, May 15, 1873 *(Record*, p. 39*)*, that Elder's filing " was not preceded by personal settlement ; that Elder never lived upon nor improved the land ; that the tract was abandoned, and that there was no valid claim existing thereto at the date of the withdrawal for the Kansas Pacific Railway Company, June 20, 1867." This was a false, fraudulent and fictitious claim, and, in the language of Mr. Justice BREWER, in *Whitney vs. Taylor*, *supra*, there was for it " an adequate remedy by proper proceedings in the Land Office."

We therefore bring the proposition for the judgment of this court, whether a sham, fictitious and fraudulent filing, *where there never was any settlement upon or improvement of the land, or attempt at settlement or improvement*, or claim by the pre-emptor made thereunder, can except the land thus made the subject of a mere paper filing from the operation of the grant.

That is the case.

The form used by ELDER for the filing in this case is set forth at large in the record, at page 78. Such filings are not required to be sworn to. They are not required to be presented in person to the local land office.

They are frequently transmitted to the local land office by mail or by agent, and filed without the Register or Receiver ever seeing the alleged pre-emptor. They are filed as a matter of course, without any inquiry into their *bona fides* as a condition of filing.

The language of this Court in *Whitney vs. Taylor*, quoted, *supra*, to wit, "The acceptance of the declaratory statement by the local land officers is *prima facie* evidence that they have approved it as a *bona fide* application," is not applicable to a pre-emption filing, since they are not constituted a tribunal at this stage of the proceeding to determine the *bona fides* or the *mala fides* of the application. They must receive it. They have no option to reject it. They must receive and file it for what it is worth. At that stage of the proceeding no provision for a hearing is provided for or contemplated, nor is a hearing ever had, nor is any determination required to be made.

This subject is so fully discussed in the light of the departmental and judicial regulations, practice and decisions, in the brief of Mr. DUDLEY, who was allowed to intervene and file a brief in the Circuit Court of Appeals, that we have reprinted the material portions of it as an APPENDIX to this brief in reply.

That such a false, fraudulent and fictitious proceeding as the Elder proceeding in this case would not except the land from the grant is evidenced by the uniform holdings of the department down to 1888 under decisions made by eminent lawyers at the head of that department (among others Mr. BROWNING, Mr. DELANO, Mr. TELLER) and administered with the approval of as many eminent lay secretaries (such as Secretary HARLAN and Secretary SCHURZ), and such was the judicial determination of the courts down to the *Dun-*

meyer case (see Union Pacific Railway Company vs. Watts, 2 Dillon, 310).

II.

If we are right in the last proposition, that cuts up this case by the roots. If we are wrong, then the effect of this sham, fraudulent and fictitious filing was to deprive the company to the right to the land by excepting it from the grant. But in this case the question as to the effect of this fraudulent and fictitious filing upon the rights of the company was made the subject of a proceeding regularly instituted by the company in the Interior Department, resulting in the decision of the Department of October 23, 1871, whereby Elder's filing was canceled because it was fictitious and fraudulent ("Exhibit A," part of the amended bill, Record, p. 18). The case was re-examined and reaffirmed December 2, 1871, as to Elder's filing. See "Exhibit B" to the amended bill (Record, p. 19), wherein it is found by the Commissioner of the General Land Office, as follows:

> "All other filings in said list are shown by the testimony in each case to have been made without a prior settlement and were therefore invalid, and the land embraced in said filings will pass to the Railroad Company without any further action upon the filings."

This included the tract filed on by Elder. This decision of the General Land Office of December 2, 1871, states that the principle on which the Office proceeded in adjusting the grant was as follows, to wit (Record, p. 18):

If any of said filings was founded on a valid settlement made prior to the filing, then, upon the cancellation of the said filings, the land reverts to the Government; but, if false and fraudulent filings were made without any settlement, then, upon that fact being established, the burden being upon the railroad company to establish it, then the tract is not excepted by such fraudulent and fictitious filing without any settlement from the grant.

That, we submit, is a sound construction of the grant. Any other construction allows speculators to flood the department, as it is a matter of public history that they did in respect of this and many other grants, with sham, fictitious, and fraudulent pre-emption filings, which, it cannot for one moment be supposed, Congress intended to protect by the provision excepting lands from the grant to which a pre-emption claim had attached; for it is absolutely impossible under the act that any pre-emption claim can attach where the pre-emptor has not entered upon and settled and improved the land.

Meanwhile, to wit, upon September 29, 1871, lawyer Mohler, of Salina, made a homestead entry on the land; that is to say, he made an affidavit of his intention to settle and cultivate the land and to enter it under the homestead act and paid the Land-Office fee of $14, which was afterwards repaid to him. Thereupon the Kansas Pacific Company instituted a proceeding in the United States Land Office, under the instructions and practice of the Interior Department, entitled "Kansas Pacific Railway Co. vs. J. G. Mohler and Charles Elder." Mohler was duly notified of this proceeding. This is shown by the testimony, to wit, by Mohler in his evidence (Record, p. 28). Testimony was taken

and a regular hearing had and the matter was decided by the Commissioner of the General Land Office, May 15, 1873 (Record, p. 39). Mohler's entry was canceled, and again the Land Office Department decided as they had decided in October 23, 1871, and December 2, 1871, and that Elder never made any settlement on the land; that his filing thereon was sham and fraudulent. Mohler accepted this decision and afterwards got back and received the $14 which he had paid as Land Office fees. This he admits in his evidence (Record, p. 30).

Thus the pre-emption filing of Elder was, in the language of Mr. Justice BREWER in Whitney vs. Taylor, 158 U. S., 85, "*shown to be purely fictitious*," and was canceled, as was also the later homestead filing of Mohler, by "*proper proceedings in the Land Office.*" The result of these decisions in due course by the Department was that upon May 15, 1873, the *locus in quo* in this case stood upon the records of the Land Office free and freed of any pre-emption or homestead claim, and the decision of the Commissioner of the Land Office was not appealed from by either Elder or Mohler, but was acquiesced in and by Mohler accepted by receiving back afterwards the Land Office fee. The patent afterwards—to wit, on September 10, 1874, granted to the Kansas Pacific, recites that the selection of the land in controversy by the Kansas Pacific was made "November, 1873, and "certified under the same date by the Register and Re-"ceiver;" that is to say, they certified in substance that the record in the Land Office showed that the land was free of any conflicting claim on the part of any pre-emptor or homesteader or others, and this patent issued to the Kansas Pacific recites, among other things, that "it is issued pursuant to the said Acts of

"Congress." The claim now made by the United States (and which is the sole foundation of the bill in this case), that this patent is absolutely void, rests upon the proposition that this sham and fictitious pre-emption filing of Elder operated not only to except the land from the grant, but also operated absolutely to withdraw it from the power and jurisdiction of the Interior Department. That such an effect can be ascribed to a pre-emption filing is contrary to the uniform ruling and practice of that department from 1846, when the railroad grant was first made, to 1888, when the Malone case was decided, which was based on an erroneous view of what this Court had decided in the *Dunmeyer case*. That such a filing excepts the land from the power and jurisdiction of the Interior Department is contrary to the uniform holding of that department from the beginning down to this day and to the uniform decisions of the Courts without an instance to the contrary. As showing the departmental construction and jurisdiction of the pre-emption act of 1841 on this subject, evidenced by repeated circulars, instructions and decisions that the filing of a pre-emption claim, even if valid, does not withdraw the land from the jurisdiction and administration of the department, we reprint in an appendix part of a careful brief on this subject by Judge PAYSON, wherein it is shown conclusively that a pre-emption filing does not constitute an appropriation of the land; that such filing is not a bar to the additional entry of the land, either by cash, homestead, or otherwise legally authorized disposal, it being understood, of course, that such disposal will be subject to the right of the pre-emptor to prove up and consummate his entry within the twelve months allowed by law; that the ex-

istence of a pre-emption filing on a tract of land does not prevent another filing to be made for the same land, subject to valid rights acquired by virtue of the former filing and actual settlement, and that where application is made by a railroad company to select lands on which pre-emption filings have been made and canceled, or where the same have expired by limitation of law, no other claim or entry appearing of record, the selections are admitted. It is impossible to read the numerous circulars and instructions and course of decision and practice in the department, as contained in the brief of Judge PAYSON, and maintain for one moment the proposition that the filing of a pre-emption claim, good or bad, withdraws the land from the administration and jurisdiction of the Land Department (see cases in this Court of *Frisbie vs. Whitney*, 9 Wall., and others cited in our main brief, p. 50, and note, to this effect).

These constructions are important when the Court comes to consider the provisions of the railroad adjustment and confirmatory act of March 3, 1887, in its application to the present case. It was in virtue of this statute that the Attorney-General felt constrained to bring this bill. For the convenience of the Court the text of that statute is reprinted as an appendix hereto.

It seems erroneously to have been supposed by the Attorney-General in bringing this bill that this act of 1887 protected, as against a subsequent *bona fide* purchaser from the railway company under a patent from the United States who was in actual possession, such a claim as that of Lawyer Mohler in this case, who never did anything but make a homestead entry, and who, it is admitted, never settled upon the land. This is a

mistaken view of the act of March 3, 1887. The third and other sections of that act carefully limit its protective provisions to the case of "a homestead or pre-emption entry of "any *bona fide settler* which has been erroneously can- "celed on account of any railroad grant." It provides that "such a settler, upon application, shall be rein- "stated in all his rights and allowed to perfect his en- "try by complying with the public land law," etc. Clearly Mohler was not any settler at all; and not being such settler, and Hoard being a *bona fide* purchaser from the company in actual possession, the fourth section of the Act of March 3, 1887, confirms his title and makes provision whereby he can have it authenticated by a patent from the United States. On the plea and proofs in this case Hoard is entitled to the benefit of the provisions of the fourth section; that is to say, entitled to this land from the United States as against Mohler or anybody else. If the decree sought for here is granted annulling the patent of the Kansas Pacific and stops there, that is useless. If it is sought to annul the title of Hoard, that would be contrary to the express provisions of section four of the act. If that annulment was absolute then it would on the principle of *res judicata* preclude him from afterwards going as a *bona fide* purchaser before the Interior Department and establishing his rights; and why will a court of equity, whose jurisdiction is invoked by the Government, and which, on issues made in the cause as to Hoard being a *bona fide* purchaser, has found him to be such, why will a court of equity not only decline to protect the title of Hoard as a *bona fide* purchaser, but grant the Government affirmative relief against him in the teeth of the provisions of the fourth

section of the act under which this suit is brought? In other words, the Government is taking this extraordinary position: instead of leaving the matter to the determination of the Interior Department; they bring the bill to annul the patent and in answer to his plea and proof against such relief that he is a *bona fide* purchaser, they say: "Ah! But you "cannot investigate that in this case; you must go "down and establish that in the Interior Department." If this Court should comply with the suggestion of the Solicitor-General in his two briefs and send Mr. Hoard back to the Interior Department and that department should determine under said Act of March 3, 1887, or the great remedial Act of March 2, 1896, that he was not entitled to the land; that adjudication would not bind him, and he could, notwithstanding such adjudication, bring the matter to judgment in the courts and have his rights judicially established and determined. Why enter a decree against him now when he has already judicially established his *bona fide* holding? A court of equity will not make him do this work over again. That is not law or equity.

III.

The position is taken by the Solicitor General that neither the Act of March 3, 1887, nor the Act of March 2, 1896, protects the purchaser in good faith and for value from the railroad company, on the ground that it is legally impossible that in such cases there could be any *bona fide* purchaser, since any pur-

chaser is bound (so the argument is) to go behind the patent, which recites that it is issued under and in pursuance of the Acts of Congress, and take notice of all the papers and documents and files of the general and local land offices.

This is an utterly unsound proposition, aside from the remedial and confirmatory provisions of the Act of March 3, 1887, and the Act of March 2, 1896. This Court has repeatedly and with great emphasis declared the solemnity and conclusive effect of a patent.

Johnson vs. Towsley, 13 Wall., 72.
St. Louis Smelting Company vs. Kemp, 104 U. S., 636.
Steel vs. Smelting Company, 106 U. S., 447.

These and many other cases are referred to in the brief of Judge WILSON, in No. 321, at pages 43, 45 and 47.

It is a novel and unheard-of proposition that a purchaser of lands which have been patented by the United States on the faith of the patent cannot be a *bona fide* purchaser unless he has gone behind the patent and inspected the files, records and archives of the local and general land offices. Supposing the purchaser had gone to the records of the land offices in this case, he would have found that, on a regular proceeding instituted against Elder, his pre-emption entry had been twice declared to be fictitious and fraudulent; he would have found that, on a regular proceeding instituted in the Land Office, the railroad company was entitled to the land as against Mohler; and that Mohler had acquiesced in the decision of the Commissioner of the General

Land Office to that effect, made May 15, 1873, and had never appealed therefrom to the Secretary of the Interior. He would have found that the land stood free on the records of the department from any homestead or pre-emption claim. He might or might not have found that Mr. Elder had filed a paper claiming a pre-emption. If he found it, he would also have found that it had been canceled. If you say he must notice an entry on the plat-books, the practice was to enter these in pencil, and then, when the filing was canceled, to expunge them, and the plat-books would have shown no claim on this land. Can we have patience with such trifling with the rights which have been regularly acquired under a patent issued in due form?

We have said that the position of the Solicitor General is novel and extraordinary. This does not sufficiently describe it. It would be revolutionary of the practice of conveyancers, if it were required from every person proposing to purchase a piece of land that had been the land of the United States, to examine all the records and files and papers and archives of the local and general land offices pertaining to the particular piece of land which he proposed to buy—and this, too, in the absence of any statute that makes these papers and files of the department constructive notice. If this is the law, will the Solicitor-General be good enough to tell the Court of what value a patent is?

On the point that, as against a patent, such files and papers are not constructive notice in the absence of any statute making them such see *Burck vs. Taylor*, 152 U. S., 634, where this Court says (p. 654):

"If notice was essential to charge them, actual notice should have been given—at least, in the absence of any statute providing some means for constructive notice."

To the same effect see *Wilson vs. Wall*, 6 Wall., 83, where this Court approved the well-known judgment of Lord Chancellor CRANWORTH in *Ware vs. Lord Egmont*, which lays down the doctrine that, where it is sought to affect a *bona fide* purchaser for value with constructive notice, the question is not whether he had the means of obtaining and might have obtained by prudent caution the knowledge in question, but whether not obtaining was an act of *gross or culpable negligence*.

Are we to be told that every settler on the patented lands of the railway company is guilty of "*gross or culpable negligence*" if he has not gone behind the patent, and examined the papers and files and proceedings on which the patent emanated, and revised the judgment of the Department of the Interior in the proceedings which culminated in the patent?

This is our first answer to the proposition of the Solicitor-General. We proceed to another answer:

The position of the Solicitor-General, as we have before stated in this brief, and also in our main brief, assumes that the land in question was, by the fraudulent and fictitious filing of Elder, not only (1) excepted from the grant to the Kansas Pacific Company, but also (2) wholly withdrawn from the jurisdiction of the Interior Department. We have already argued above the proposition (1) that it was not even excepted from the grant to the company. Our proposition now is (2) that, in any event, the land clearly was not withdrawn from the jurisdiction of the Interior Department. Upon the cancellation by the Interior Department

of the fraudulent filing by Elder the land either belonged to the railway company, or it continued to be public land of the United States. We have shown in our main brief *(p. 50, note)* that, even after Elder's filing had been made, and before it was canceled, the land in question continued to be public land. As such public land it continued under the jurisdiction of the Interior Department and subject to its disposal. This is shown by the very cases that are cited in this court by the Solicitor General as supporting his position. For example, in the *Dunmeyer case*, after the filing in question, and after the cancellation thereof, the Interior Department continued to exercise jurisdiction over the land there in question. So, also, in *Hastings and Dakota Railroad Company vs. Whitney*, 132 U. S. 357, and in *Whitney vs. Taylor*, the Land Department, after the cancellation of the pre-emption filing, continued to exercise and maintain jurisdiction over the land there in question. This was, in each of those cases as in the present case, because, notwithstanding the pre-emption or homestead filing, and after those filings had been cancelled, the land all the time continued to be public land within the jurisdiction of the Interior Department.

The fundamental proposition, therefore, of the Solicitor-General, to wit, that the pre-emption filing of Elder had withdrawn the subject matter—that is to say, the land in question—from the jurisdiction of the Interior Department, is erroneous and unsound, and is contrary to the statutes of the United States which govern the disposition of public lands, and contrary to the repeated decisions of this Court.

The next answer to the position of the Solicitor-General that it is legally impossible that Hoard could be a *bona fide* purchaser because the patent is void, and there can be no *bona fide* purchaser under a void patent, is that that is directly contrary to the fourth section of the Act of March 3, 1887, and clearly in the teeth of the provisions of the remedial Act of March 2, 1896.

Without dwelling further on the Act of March 3, 1887, we wish to call attention to the broader provisions of the Act of March 2, 1896. The provisions of this act, its Congressional history, its obvious and well-known purpose and effect are discussed in Point III. of our main brief at pages 52–64, to which we refer. We have read the position of the Solicitor-General in respect of this act in his brief, and contest the soundness of every proposition by which he endeavors to support it. If the remedial Act of March 2, 1896, does not apply to the case of a void patent it is utterly useless as a protection to *bona fide* purchasers, as they did not need it. They were protected without it; and this was pointed out in the debates in Congress when the Act of March 2, 1896, was passed.

We therefore deny the proposition that the Act of March 2, 1896, was not intended to recognize anybody as a *bona fide* purchaser who would not be such irrespective of the provisions of that act. In the contemplation of that act it is immaterial whether the certification or the patent was void or voidable. In either case the Court proceeded on the theory that the public had acted and relied on the accredited action of the department in making the certification or in issuing the patent, and, where such reliance had been placed

and purchases made, Congress said two things: It said to the Government, "You shall not annul that title;" and it said to the purchaser, "We confirm your title."

This Act of March 2, 1896, revolutionizes the practical construction which had been placed upon the Act of March 3, 1887, whereby the Interior Department thought it to be its duty to recommend the institution of suits of this kind by the hundreds—aye, by the thousands—against *bona fide* purchasers of the patentees of the railway companies to protect entries originally invalid or abandoned a generation before. In the present case there is no conflict between the Act of March 3, 1887, and the Act of March 2, 1896; but, if there were, the Act of March 2, 1896, would control. Suits questioning the title to thousands of farms and properties operated as a blight upon large portions of six or seven States of the Union. Nobody knew when he was safe. The holder of lands could not sell them. They no longer served as a basis of credit. The hand of improvement was paralyzed. Iniquities, such as are sought to be consummated by the bill in this case, to wit, to take the land from persons who have held it under the sanction and protection of the patent of the United States for twenty odd years (twice the limitation period in Kansas), improved to the extent of thousands of dollars, and to give it by a decree of court to a man who never expended a dollar upon it, are just what the Act of March 2, 1896, was enacted to prohibit and interdict. A dreadful situation had been brought about by the misinterpretations put upon the decision in the *Dunmeyer case*, and the erroneous construction put upon the Act of March 3, 1887. It will defeat the be-

nign intention of Congress if this Court does not give to this remedial act the curative and healing purpose which Congress manifestly intended.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
T. F. GARVER,

Of Counsel for said Defendants Union Pacific Railway Company and William Hoard.

APPENDIX I.

Brief of Mr. Dudley, Referred to in the Foregoing Argument.

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE EIGHTH CIRCUIT.

MAY TERM, 1894.

No. 495.

UNITED STATES OF AMERICA,
Appellant,

vs.

THE UNION PACIFIC RAILWAY COMPANY, HENRY GAY, M. J. WELLSLOGER AND WILLIAM HOARD,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Brief for Northern Pacific Railroad Company.

(By permission of the Court.)

THE CASE.

This is an action brought by the United States to have declared void and a cloud upon its title, letters patent issued by the United States to the Kansas Pa-

cific Railway Company September 10, 1874, under the act of congress approved July 1, 1862, for the north-east quarter of section one, township fifteen south, of range three west, in Saline county, Kansas. The contention of the United States is that this land was excepted from the grant made to the Kansas Pacific Railway Company by the acts of congress granting lands to aid in the construction of that company's road; and that the patent which was issued to the company therefor was issued by mistake and without authority of law.

ARGUMENT.

POINT I.

The filing of a declaratory statement does not operate to reserve or appropriate the land.

As the filing of Elder and the definite location of the line of the road preceded the adoption of the revised statutes, the effect of that filing must be determined in view of the law as it then existed. The land in controversy was, it appears, "unoffered land," that is, it had never been proclaimed for sale.

The act of congress approved September 4, 1841, (5 Stat. 455) provided:

Sec. 10. "And be it further enacted, that from and after the passage of this act, every person being the head of a family, or widow, or single man, over the age of twenty-one years, and being a citizen of the United

States, or having filed his declaration of intention to become a citizen, as required by the naturalization laws, who since the first day of June, A. D. eighteen hundred and forty, has made or shall hereafter make a settlement in person on the public lands to which the Indian title had been at the time of such settlement extinguished, and which has been, or shall have been, surveyed prior thereto, and who shall inhabit and improve the same, and who has or shall erect a dwelling thereon, shall be, and is hereby, authorized to enter with the register of the land office for the district in which such land may lie, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claim upon paying to the United States the minimum price of such land, subject, however, to the following limitations and exceptions: No person shall be entitled to more than one preemptive right by virtue of this act; no person who is the proprietor of three hundred and twenty acres of land in any state or territory of the United States, and no person who shall quit or abandon his residence on his own land to reside on the public land in the same state or territory, shall acquire any right of preemption under this act.

Sec. 12. That prior to any entries being made under and by virtue of the provisions of this act, PROOF of the settlement and improvement thereby required, shall be made to the satisfaction of the register and receiver of the land district in which such lands may lie, agreeably to such rules as shall be prescribed by the secretary of the treasury, who shall each be entitled to receive fifty cents from each applicant for his services, to be rendered as aforesaid; and all assignment and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void.

Sec. 13. That before any person claiming the benefit of this act shall be allowed to enter such lands, he or she shall make oath before the register or receiver of the land district in which the land is situated, (who are hereby authorized to administer the same) that he or she has never had the benefit of any right of preemption under this act; that he or she is not the owner of three hundred and twenty acres of land in any state or

territory of the United States, nor hath he or she settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to his or her own exclusive use or benefit; and that he or she has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he or she might acquire from the government of the United States, should enure in whole or in part, to the benefit of any person except himself or herself; and if any person taking such oath shall swear falsely in the premises, he or she shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he or she may have paid for said land, and all right and title to the same, and any grant or conveyance which he or she may have made, except in the hands of *bona fide* purchasers, for a valuable consideration, shall be null and void. And it shall be the duty of the officer administering such oath to file a certificate thereof in the public land office of such district, and to transmit a duplicate copy to the general land office, either of which shall be good and sufficient evidence that such oath was administered according to law.

Sec. 15. That whenever any person has settled or shall settle and improve a tract of land, subject at the time of settlement to private entry, and shall intend to purchase the same under the provisions of this act, such person shall in the first case, within three months after the passage of the same, and in the last within thirty days next after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon, and declaring the intention of such person to claim the same under the provisions of this act; and shall, where such settlement is already made, within twelve months after the passage of this act, and where it shall hereafter be made, within the same period after the date of such settlement, make the proof, affidavit and payment herein required; and if he or she shall fail to file such written statement as aforesaid, or shall fail to make such affidavit, proof and payment, within the twelve months aforesaid, the tract of land so settled and improved shall be subject to the entry of any other purchaser."

Section 5 of the act of congress approved March 3, 1843, (5 Stat. 619), provides as follows:

"That claimants under the late pre-emption law, for land not yet proclaimed for sale, are required to make known their claims, in writing, to the register of the proper land office, within three months from the date of this act when the settlement has been already made, and within three months from the time of the settlement when such settlement shall hereafter be made, giving the designation of the tract, and the time of settlement; otherwise his claim to be forfeited, and the tract awarded to the next settler, in the order of time, on the same tract of land, who shall have given such notice, and otherwise complied with the conditions of the law."

These provisions of the pre-emption law remained unchanged until 1870, and were in full force at the time of, and governed and determined the effect of, the Elder filing.

The filing of a declaratory statement under the pre-emption law does not constitute an entry of the land. The distinction between the entry and the declaratory statement is very marked, and care should be taken not to confuse the two.

The Entry.

The entry is made only "upon paying to the United States the minimum price for such land." *(Sec. 10 supra.)* As a condition precedent thereto, the settler is required to "make proof of the settlements and improvement required," and to "make oath before the register and receiver" of his or her qualifications. Twelve months are allowed from the date of settlement in which to make the entry on offered lands; on unoffered lands the time was, until 1870, limited only by the proclamation of the lands for sale. A valid pre-

emption entry—that is, the payment to the U. S. for the land—vests the entryman with an equitable title to the land entered, of which not even congress can deprive him. And whether made under the pre-emption, homestead, or other public land law, the "entry" operates to segregate the land entered from the mass of public lands. It reserves and appropriates the land. Its allowance requires the exercise of *quasi* judicial functions on the part of the land officers, and, if the land be subject to entry, their decision, until reversed and the entry cancelled, preserves the land from other disposition.

H. & D. R. R. Co. v. *Whitney*, 132 U. S., 357, 363–4.
Reservation of Land for Public Uses, 17 Op. Atty.-Gen , 160.
Cornelius v. *Kessel*, 128 U. S., 456, 460.
Simmons v. *Wagner*, 101 U. S., 260, 261.
U. S. v. *Steenerson*, 4 U. S. App., 332, 347–8.
Stimson v. *Clarke*, 45 Fed. Rep. 760.

And this is also the settled doctrine in the department.

Kate Cox, 1 L. D., 52.
Whitney v. *Maxwell*, 2 L. D., 98.
Henry Cliff, 3 L. D., 217, 218.
St. P. M. & M. Ry. Co. v. *Forseth*, 3 L. D., 446.
Legan v. *Thomas, et al.*, 4 L. D., 441.
Nyman v. *St. P. M. & M. Ry. Co.*, 5 L. D., 396.
Grove v. *Crooks*, 7 L. D., 140.
James A. Forward, 8 L. D., 528.
Etnier v. *Zook*, 11 L. D., 452.
Leary v. *Manuel*, 12 L. D., 345.
Kaweah Co-operative Colony, 12 L. D., 326.
Swims v. *Warde*, 13 L. D., 686.
Mathies v. *Ebert*, 14 L. D., 589.
Edwards v. *Kemt*, 15 L. D., 405.

The Filing.

The declaratory statement, or notice of intention to claim the land, must, if the land be offered land, be filed within thirty days from settlement; for unoffered land, within three months from such time. It is a brief written notice, giving the date of the alleged settlement, the description of the land, and declaring the intention of the settler to claim the land under the pre-emption laws. It may be, and frequently is, transmitted to the local office by mail, or by agent, and is filed without the officers ever seeing the alleged settler,*

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* In a letter written October 23, 1857, the commissioner of the general land office says, "the declaratory statement need not be be filed in person. The settler must file a written statement signed by himself or his duly authorized attorney. It may be transmitted by mail, or entrusted to an agent, but in either case, at the risk of the settler." (1 Lester's Land Laws, 464).

The commissioner in his annual report for 1885, speaking of declaratory statements, says:

"These are pre-emption filings, which have never been required by office regulations to be authenticated even by a 'land office oath.' A simple 'declaration of intention' purporting to be signed and witnessed, is all that is required to put a claim of record. The filings are not required by regulations to be made in person; they may be sent through the mails, and are sent, not only from within, but without land districts, and even from distant states, where the parties are not settlers on public lands, as claimed, have never seen the lands for which filings are made, and have never been in the state or territory in which the lands lie; and speculators cover the records with such filings." Page 70.

"The method of keeping a record of these declaratory statements in the land offices is prescribed in Circular of Instructions issued September 5, 1841, and May 8, 1843. Under the act of September 4, 1841, a declaratory statement was not required for unoffered lands. In circular of September 15, 1841, the district land officers were instructed as follows:

or having any knowledge of the facts recited in the declaratory statement.

The filing of the declaratory statement does not represent a determination by the officers upon any of the recitals contained in the statement. They do not, as a condition precedent to allowing the filing, pass upon the qualifications of the declarant, or determine if he has made a settlement as alleged. Indeed the statement is not required to allege facts sufficient to show that the declarant is qualified to enter land under the pre-emption laws. The only question

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" Where the land was subject to private entry at the date of the settlement made since 1st June, 1840, and prior to the passage of this act, and the settler is desirous of securing the same under this act, he must give notice of his intention to purchase the same under its provisions within three months from the passage of the law; that is, before the fourth day of December next.

(Where the land was subject to private entry at the date of the law and a settlement shall thereafter be made upon such land, or) where the land shall hereafter become subject to private entry, and after that period a settlement shall be made, which the settler is desirous of securing under this act, such notice of his intention must be given within thirty days after the date of such settlement. Such notice in both (all) cases must be a written one, describing the land settled upon, and declaring the intention of such person to claim the same under the provisions of this act.

In the first case the proof, affidavit, and payment must be made within twelve months after the passage of this act; and in the second case, within twelve months after the date of such settlement.

These declaratory statements are to be regularly numbered by the register in the order of the date of their reception, and entered in a suitable book, columned off to show the number, date when received, name of the party, and description of the tract claimed; and monthly abstracts of the same are to be furnished to the general land office, with your monthly returns.

The existence of these claims should be indicated on the township plats by marking, with red ink, a cross (†) on the spot occupied by the tract claimed; and, also, with red ink, noting on the same spot the number of the declaratory statement in neat and very small figures, so as not too much to interfere with the regular an-

the officers are called upon to determine in filing a declaratory statement is, whether or not the land is public. THE EXISTENCE OF A FILING OF RECORD THEREFORE, UNLIKE AN ENTRY, IS NOT EVIDENCE OF A DECISION BY THE OFFICERS UPON THE FACTS RECITED IN THE STATEMENT.

The filing of a declaratory statement does not operate to reserve or appropriate the land described therein, or to take it out of the category of public lands.

The filing, if made by one qualified to enter the land under the pre-emption laws, confers a mere

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notations which shall have to be made when the regular proof and payment shall have been made by claimant, and his entry of the tract consummated. The existence of the such claims should also be noted, in pencil, in their appropriate places in the tract books. (Lester L. L., 362-3.)

The act of March 3, 1843, having required declaratory statements to be filed for unoffered lands, the following additional instructions were issued March 8, 1843:

"The fifth section requires that similar notices or declarations in writing should be filed by settlers under the act of 4th September, 1841, on land not subject to private entry. These declarations are to be filed in your office by every such settler within three months after his settlement, except as to those whose settlements were made prior to the 3rd March last; in which cases such declarations are to be filed within three months from that date, viz.: before the 3rd June next. The register will number such statements regularly in the order of their date of reception, enter them in a suitable book prepared therefor, furnish this office with monthly abstracts from said book, and in all other respects pursue the same course in relation to them as he is required to do by the 3rd and 4th paragraphs on the second page of the circular of the 15th September, 1841, in regard to the declarations therein referred to. Particular care must be taken not to confound the two species of declarations, but to keep separate files thereof, enter them in the respective books prepared for each, and in the monthly abstracts transmitted to this office, discriminate between the two by heading the one 'For land subject to private entry,' and the other 'For land not yet offered for sale.'" (Lester's L. L., 371.)

This practice remained unchanged until the repeal of the pre-emption law.

The form in use for filings is shown in Elder's filing. Record 78.

preference right of purchase as against third persons, provided the land is disposed of under the public land laws; but it confers no rights as against the United States; and the land covered by such filing remains public land, open to either settlement or entry by any qualified person, subject to the possible exercise by the filer of his preference right of purchase.

Reservation of Lands for Public Uses, 17 Op. Atty.-Gen. 160.

Forbes v. *Driscoll*, (Dak.) 31 N. W. Rep. 633, 636.

Brown v. *Corson*, (Ore.) 19 Pac. Rep. 66, 72–3.

Hemphill v. *Davies*, 38 Cal. 577, 579.

Decision of Commissioner, dated Sept. 1, 1868, Zabriskie's Land Laws, 85.

Thomas v. *Drumhiller*, 1 L. D. 486.

Field v. *Black*, 2 L. D. 581.

State of Alabama, 3 L. D. 315.

Iddings v. *Burns*, 8 L. D. 224.

Waller v. *Davis*, 9 L. D. 262.

Opinion of Asst. Atty. Gen. Shields, 12 L. D. 83, *et seq.*

Kaweah Co-operative Colony, et al., 12 L. D. 326, *et seq.*

Jefferson Davenport, 16 L. D. 526.

The supreme court of Dakota, in the case of *Forbes* v. *Driscoll*, 31 N. W. Rep., 633, says:

"The pre-emption law never sought to sever or segregate the pre-emption claim from the public domain. **It remained a part of the public domain until the pre-emptor entered the land by 'proving up' and paying therefor at the local office.** The declaratory statement made by the pre-emptor was only a notice of intention to claim the land so settled upon, and it conferred no rights upon the settler outside of the lands actually settled upon and occupied by him as against other settlers, nor even

as to his actual occupation as against the government. *Frisbie* v. *Whitney*, 9 Wall., 187. Yosemite Valley Case, 15 Wall., 77.

"As to all portions of the premises named in the declaratory statement not actually occupied, *they were still public lands*, opened to the occupation of any honest settler who desired, in good faith, to contest the pre-emption rights of a prior settler.

* * * * This has been the interpretation given the law by the department and the courts from the earliest period of its enactment." pp. 636, 637.

In *Field* v. *Black*, 2 L. D., 581, the secretary says:

"That the filing of the declaratory statement, which is a 'declaration of one's intention to claim a tract of land,' confers a mere preferred right of pre-emption against third persons, and confers no rights against the United States, and that, therefore, *land covered by such a filing is public land*, and open to either settlement or entry by any qualified person, subject only to the right of the pre-emptor, is thoroughly settled by the decisions of the courts and of this department."

And in the case of *Waller* v. *Davis*, 9 L. D., 262:

"*Land covered by a pre-emption filing is still 'public land*,' open to settlement or entry subject only to the preferred right of pre-emption."

The filing of Elder was, consequently, without effect so far as the railroad grant was concerned, except as it might operate to attach to the land "a pre-emption or homestead claim."*

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* **The distinction between "entries and filings" is of the utmost importance in the case at bar, and in examining the decisions with reference to these questions it should be kept in mind.** In K. P. Ry. Co. v. Dunmeyer, 113 U. S., 629; McIntyre v. Roeschlaub et al., 37 Fed. Rep., 556; H. & D. R. R. Co., v. Whitney 132 U. S., 357; Sioux City etc. Land Co. v. Griffey, 143 U. S. 32; Bardon v. N. P. R. R. Co., 145 U. S., 535, the lands held excluded from the grants there in question, were excluded by **"entries."**

POINT II.

The term "pre-emption claim," as used in the land grant legislation of Congress, is synonymous with "pre-emption right," and indicates a lawful claim.

A review of the land grant legislation shows that the terms "right of pre-emption," "pre-emption right,"

In H. & D. R. R. Co. v. Whitney, supra, the court, holding a voidable **entry** would exclude land from a grant says: 'But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants.' (364.) And see Newhall v. Sanger, 92 U. S., 761; McIntyre v. Roeschlaub et al., 37 Fed. Rep., 556; Bardon v. N. P. R. R. Co., 145 U. S., 540, 545; St. P. M. & M. Ry. Co., v. Forseth, 3 L. D. 446; St. P. M. & M. Ry. Co. v. Leech, 3 L. D. 506; Hollants v. Sullivan, 5 L. D., 115; W. & St. P. R. R. Co., 9 L. D. 653; S. P. R. R. Co. v. Cline, 10 L. D., 31; St. L. & I. M. R. R. Co., 13 L. D., 560. But this reasoning does not and cannot apply to a **pre-emption filing.** Compare the following decisions with reference to pre-emption filings: N. P. R. R. Co. v. Meadows, 46 Fed. Rep., 252; Cahalan v. McTague, 46 Fed. Rep., 251. (In this case what is inadvertently called an entry made June 13, 1878, was a D. S. filing); McLaughlin v. Mentotti (Cal.) 26 Pac. Rep. 882; Sioux City etc. Co. v. Griffey, 143 U. S. 41; Claim of Lutz's Heirs, 9 Op. Atty. Gen. 515; 1 Copps L. O., 29, 6 Copp's L. O. 142; Caldwell v. M. K. & T. R. R. Co., 8 L. D., 570; Allers v. N. P. R R. Co., 9 L. D. 452; N. P. R. R. Co. v. Stovenour, 10 L. D., 468; N. P. R. R. Co., v. Moling, 11 L. D. 130; Kricklan v. St. P. & S. C. R. R. Co. 13 L. D. 22; N. P. R. R. Co. v. Fleet, et al., 13 L. D. 617; Meister v. St. P. M. & M. Ry. Co, 14 L. D., 624. A declaratory statement is sometimes spoken of as "prima facie valid," "valid upon its face" or "voidable." The use of these terms ignores at once the nature and definition of a declaratory statement, and the definition of the terms used. A declaratory statement is as the name indicates, a statement and nothing more. It can no more be valid, or "prima facie valid," or "valid on its face," or "invalid" or "voidable," or "void," than can an affidavit or any other statement of facts.

and "pre-emption claim" are employed as synonymous terms, and are used indifferently to designate the preference claim or right to purchase the land which the settler having acquired by compliance with the pre-emption law, Congress desired to protect by excluding the land from the grant. The first act granting lands to aid in the construction of a railroad was the act of September 20, 1850, entitled "An act granting the right of way, and making a grant of land to the states of Illinois, Mississippi and Alabama, in aid of the construction of a railroad from Chicago to Mobile," (9 Stat. 466). By this act it was provided:

> "In case it shall appear that the United States have when the line or route of said road and branches is definitely fixed by the authority aforesaid, sold any part of any section hereby granted, or that the right of pre-emption has attached to the same," lieu lands shall be selected "equal to such lands as the United States have sold, or to which the right of pre-emption has attached as aforesaid. * * *"

Substantially this same formula, using the term "right of pre-emption," is used in many of the subsequent railroad grants.

In other acts the term used is, "pre-emption claim." Thus in the act approved July 1, 1862, 12 Stat. 489, there is granted every alternate section, etc., "to which a pre-emption or homestead claim may not have attached." And see:

> Act of June 2, 1864, 13 Stat. 95; act of July 2, 1864, 13 Stat. 356; and act of March 3, 1871, 16 Stat. 573.

These acts were all passed pursuant to a uniform policy, and are to be construed *in pari materia.*

That this use of the term "pre-emption claim" as indicative of a lawful claim or right, a claim or right which the law creates as the consequence of certain acts, is the use intended by congress in the act under consideration, is plainly declared in the fourth section of the amendatory act of July 2, 1864. In that act congress, after enlarging the grant, provides:

"And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or *other lawful claim.*"*

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* It has been said that the term "lawful" cannot be imported to modify the words "claims or rights." This is true. But if congress used the terms as indicative of "lawful" claims (and it here expressly so declares) the restriction of the term to the sense in which it was used does not violate the rule. It has, further, sometimes been said that in Newhall v. Sanger, 92 U. S., 761, the supreme court held that a "claim" need not be lawful to exclude land from a grant like that to the Union Pacific. Such statement ignores the facts of that case, and entirely misconstrues the decision. In that case it was held that the act of March 3, 1851, 9 Stat. 631, and of March 3, 1853, 10 Stat. 244, created a reservation of all "lands claimed under any foreign grant or title." And it was in connection with this verb "claimed" as used in the act of 1853, that it was held to be immaterial whether lands were lawfully claimed or not. As long as they were "claimed" they were, by the acts of 1851 and 1853, "reserved" and the reservation was valid. And it was because they were "reserved" that they were held excluded from the grant, not because a "claim" had attached thereto, within the meaning of the railroad act. U. S. v. McLaughlin, 127 U. S., 428, 454. The "claims" referred to in that act were expressly defined to be "lawful claims." The case is like that of H. & D. R. R. Co. v. Whitney, 132 U. S., 357, where the court held a voidable entry excluded land from a grant because, until cancelled, it was "such an appropriation of the land as segregates it from the public domain." (364). Nor has the supreme court ever questioned the right of a railroad company to show, for the purpose of establishing its title to land, that an apparent claim thereto, existing at the date of definite location, was, in fact, an unlawful claim, and not within the meaning of the exception.

This is a congressional definition of a "pre-emption claim" as used in the act here under consideration. At the time of this enactment no rights had attached under this grant. The entire subject-matter was under the control of congress, and this interpretation by congress of its own acts is, under these circumstances, controlling.

U. S. v. *Freeman*, 3 How., 556, 564.
Philadelphia etc. R. R. Co. v. *Catawissa R. R. Co.*, 53 Pa. St. 20, 39, 60.
U. S. v. *Gilmore*, 8 Wall., 330, 332–3.

That this is the true construction of the phrase "pre-emption claim" further appears by a reference to the Northern Pacific, *; Atlantic & Pacific, §; Texas Pacific, †; and similar grants. In these acts congress, after granting lands in terms similar to those in the act here considered, provides indemnity in lieu of the lands excepted. These indemnity clauses are substantially alike, and are as follows: (we quote from the Northern Pacific act.)

The statement in the case of K. P. Ry. Co. v. Dunmeyer, 113 U. S., 629, 641, and H. & D. R. R. Co. v. Whitney, 132 U. S., 357, 364, that it was not the intention of congress to create by these grants a contestant with an interest to defeat individual claims, was in answer to an argument that the railroad company took lands not free from claims or rights at the date of grant or definite location, subject to such claims or rights; and by the extinguishment thereof without ripening into a perfect title, acquired title to the land, Bardon v. N. P. R. R. Co., 145 U. S., 535, 344. To quote such a statement in support of an argument that congress did not intend the railroad company to show, by contest if necessary, that an apparent claim was not, at the date of the grant or definite location, a lawful claim and not within the meaning of the term as used in the grant to designate the exception, is an unwarranted perversion of these decisions.

* 13 Stat. 365.
§ 14 Stat. 292.
† 16 Stat. 578.

"And whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof."

The obvious purpose of this provision is to provide indemnity for all lands (except mineral) excluded by the terms of the granting clause. The enumeration of the losses for which indemnity may be taken is synonymous with the enumeration of exceptions in the granting clause. And the lands excepted from the grant because of the attachment thereto of a "pre-emption claim" are clearly those described in the indemnity clause as "pre-empted." And to cause lands to be "pre-empted" a valid and lawful claim must be initiated; one which the pre-emption law recognizes and enforces.

Brown v. *Corson*, (Ore.) 19 Pac. Rep., 66, 73.

McLaughlin v. *Menotti*, (Cal.) 26 Pac. Rep. 880, 882.

Passing from this interpretation founded upon the letter of the law, and examining the statute in the light of the manifest purpose of congress, we reach the same conclusions. The purpose of congress was to encourage the development of the country by permitting the continued disposition of the lands under the ordinary land laws until the lands granted should be defined by fixing the definite location of the railroad. To accomplish this result it was provided that the pre-emption and homestead claims which should have attached prior to such identification of the granted lands, should

be protected by the exclusion of such lands from this grant. This was the only purpose.

M. K. & T. R. R. Co. v. *K. P. Ry. Co.*, 97 U. S. 491, 498.

W. & St. P. R. R. Co. v. *Barney*, 113 U. S. 618, 625-6.

And consistent with this purpose it is to be presumed that congress intended to protect claims vitiated by fraud, or which the law could not recognize, and which it was the duty of the department to cancel. To protect such claims is not within the spirit of the exceptions. We have seen that it was not within the letter of the act.

"That act does not speak of entries or filings as excepting lands from the operation of the grant, but of rights; the right of pre-emption and homestead. The spirit of the act was to protect pre-emption and homestead settlers having valid and subsisting rights at the time the grant became certain."

Elmslie v. *Young*, 24 Kas. 732, 741.

Young v. *Goss*, (Kas.) 22 Pac. Rep. 572, 573.

Says Judge Sawyer:

"Congress manifestly designed the grant to be for the full amount of land indicated; and the only purpose of the exception at all of the classes mentioned, was to prevent interference with the rights existing in others. The exception was not designed to limit the grant, but to avoid disturbing substantial rights already vested and still existing. * * * The intention was to give the full amount of land designated, and the only care of congress was not to interfere with the rights already vested and still existing."

Ryan v. *C. P. R. R. Co.*, 5 Saw. 260, 264.

Brown v. *Corson*, (Ore.) 19 Pac. Rep. 66, 69, *et seq.*

U. P. Ry. Co. v. *Watts*, 2 Dill. 310, 312.

POINT III.

A declaratory statement does not create a "pre-emption claim" or "pre-emption right" nor does the filing of such statement of itself, and without more, attach such right or claim to the land.

"The right of pre-emption is the right to enter lands at the minimum price in preference to any other person, if all the requirements of the law are complied with. The prior settlement, declaratory statement and proof are *not* the pre-emption, but only the means of securing the right of pre-emption."

Nix v. *Allen*, 112 U. S., 129, 136.

"It is simply the right which a person *who has complied with certain requirements of the law*, has to purchase a portion of the public lands at the minimum price to the exclusion of all others. It is wholly a creature of the statute, and is exercised and exhausted as soon as the purchase and entry are made."

Camp v. *Smith*, 2 Minn., 138 (Gilf.)
McKean v. *Crawford*, 6 Kas., 112, 118.
Myers v. *Croft*, 13 Wall., 291, 296.
Aiken v. *Ferry*, 6 Saw., 79, 87.
s. c. 1 Fed. Cases, 240, 244.
Dillingham v. *Fisher*, 5 Wis., 475, 480.
J. B. Raymond, 2 L. D., 854, 855.

The pre-emption right or claim is purely statutory.

"To create a right of pre-emption there must be settlement, inhabitation, and improvement by the pre-emptor."

Hosmer v. *Wallace*, 97 U. S., 575, 579.

"This (the pre-emption right) was the right to pre-empt a quarter section of land *by settling upon and improving it.*"

Myers v. *Croft*, 13 Wall., 291, 296.

"The right of pre-emption is the right to enter lands at the minimum price in preference to any other person, *if all the requirements of law are complied with.*"

Nix v. *Allen*, 112 U. S., 129, 136.

"Among the things which the law required of a pre-emptor, and the principal things required of him to secure his right, were: 1. To make a settlement on the land in person. 2. To inhabit and improve the same. 3. To erect a dwelling house thereon."

Atherton v. *Fowler*, 96 U. S. 513, 518.

Ferguson v. *McLaughlin*, 96 U. S. 174.

"Those laws (the pre-emption laws) are intended for the benefit of persons making a settlement upon the public lands, followed by residence and improvement and the erection of a dwelling thereon."

Bohall v. *Dilla*, 114 U. S., 47, 51.

Says Judge DEADY:

"Such rights (of pre-emption) must accrue upon the performance of the acts on account of which it is given. These are the settlement on the land, including its improvement and inhabitancy, and the filing of the declaratory statement."

Aiken v. *Ferry*, 6 Saw. 79, 87.

Says the supreme court of Minnesota:

"To constitute a valid right of pre-emption under the act of 1841, the spirit and terms of the law require a personal settlement by the claimant upon the land, and the original settlement must be followed by occupancy of the land as the home of the settler."

Kelly v. *Wallace et al.*, 14 Minn. 173, 178 (Gilf. ed.)

Says the supreme court of Iowa:

"The pre-emption law requires that any one claiming its benefits shall make an actual settlement, in person, upon the land claimed. There must be an actual settlement in person before any right attaches."

Walker v. *Stone*, 48 Iowa, 92, 95.

"The laws have invariably required that in order to acquire this right, a person must have settled upon the land or cultivated a portion of it, or have done both."

Dillingham v. *Fisher*, 5 Wis. 475, 480.

"A settlement must be made, and notice of intention to purchase the land as a pre-emptor must be given within thirty days from the date of such settlement. The settler must inhabit and improve the same, and must erect a dwelling thereon, to entitle him to the privilege."

Pre-emptions. 4 Op. Atty. Gen., 493.

"It has been repeatedly and invariably held by this department that no settlement right can attach to land covered by a homestead entry, and that a filing without a previous settlement is a nullity."

Mary Lewis, 3 L. D., 187, 188.

"Such right is initiated by settlement and filing a declaratory statement."

J. B. Raymond, 2 L. D., 854, 855.

"A filing without settlement is illegal, and no rights are acquired thereby."

Circular from the General Land Office Showing Manner of Proceeding to obtain Title to Public Lands under the Pre-emption, Homestead and Other Laws; issued February 6, 1892, p. 190.

As the United States has introduced no testimony whatever showing or tending to show the qualifications of Elder, *and as the evidence clearly establishes that he never made settlement, or resided upon the land*, the appellant has utterly failed to show that this land was not free from pre-emption claims or rights at the time the line of the railroad coterminous therewith was definitely fixed. And as the land was public land, not sold, reserved, or otherwise disposed of by the United

States at the date of fixing the definite location of the road, it passed by the grant to the railroad company, and the patent was rightfully issued.

POINT IV.

Analogous Cases.

Department Decisions.

The conclusions we have reached are supported by a uniform line of decisions in the interior department extending down to July 9, 1888, when the case of *Malone* v. *U. P. Ry. Co.*, 7 L. D., 13, first announced a different doctrine.

In a circular of instructions to registers and receivers, issued November 7, 1871, the commissioner says:

"It has been represented that in many cases these filings have been made without the preliminary settlement required by the pre-emption laws; that such filings do not in such cases constitute a pre-emption claim or right; that such right can only exist where the party has a legal *status*, which he does not have except by actual settlement prior to filing; and that such illegal filings cannot defeat the railroad claim where the companies can establish the illegality of the filing, or, in other words, that fraud in the inception of the pre-emption claim renders it absolutely null and void, and that it does not therefore affect the right of the railroad.

I have carefully considered these propositions, and have reached the conclusion that a filing made with allegation of previous settlement, but where it can be clearly shown that such settlement was not in fact made, is a filing in derogation of law, and is fraudulent; consequently is not a pre-emption claim or right

recognized by the law, and does not withdraw the land from the right of the road."

Copp's Public Land Laws, 405 (ed. 1875).

See also:

Circular of Instructions issued August 15, 1872.

Copp's Public Land Laws, 389 (ed. 1875).

"A pre-emption claim may be defined to be a right or interest subsisting under the pre-emption law, in some person, to a tract of public land, which by a further full compliance with the law, may be ripened into a perfect title."

W. P. R. R. Co. v. *Spraat* (Decided July 17, 1872). Copp's Pub. Land Laws, 416 (ed. 1875).

Secretary SCHURZ, speaking in a case where a D. S. filing was made two days before the grant attached, says:

"The obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue. 1st Greenleaf on Evidence, p. 98. The burden of proving that the land in question was covered by a valid pre-emption claim was therefore upon Vincent, and it was necessary for him to prove that Robbins had not only initiated a prior valid settlement, but that he also possessed all the personal qualifications required by the pre-emption laws. * * * The testimony fails to show that Robbins was a qualified pre-emptor, and I am of opinion that under the rule of law above mentioned the plaintiff has not made out his case. *Walker's Heirs* v. *California*, Copp's Land Laws, p. 287; *McComber* v. *California & Oregon R. R. Co.*, Copp's Land Owner for February, 1876, p. 163."

Vincent v. *St. J. & D. C. R. R. Co.* (decided April 28, 1877), 4 Copp's L. O., 44, 45.

McOuat v. *W. & St. P. R. R. Co.* (decided October 3, 1877), 4 Copp's L. O., 163.

Weber v. *W. P. R. R. Co.* (decided March 14, 1879), 6 Copp's L. O., 19.

Blodgett v. *C. & O. R. R. Co.* (decided April 7, 1879), 6 Copp's L. O., 37.
McMurdie v. *C. P. R. R. Co.* (decided May 13, 1881), 8 Copp's L. O., 36.

Says Secretary TELLER:

"Inasmuch as it has been established that Ossa never settled as alleged in his declaratory statement, and that he neither resided upon nor improved the land as alleged in his final proof—viz., between 1869 and 1874, nor at any other time, I am of the opinion that at no time had he acquired any right to the tract; and that it was therefore competent for the company to prove that he had perpetrated a fraud against the government and its own rights in entering and attempting to convey the land as alleged. Upon the establishment of the fact that the entry was fraudulent your office very properly canceled it pursuant to the provisions of section 2262 of the Revised Statutes.

"As his bad faith had been established, I am of opinion that his claim was invalid—being vitiated by fraud—and did not except the land from the operation of the company's grant; for upon this hypothesis the cancellation took effect by relation as of the date of his settlement, so that it may be said his filing never existed."

Emerson v. *S. P. R. R. Co.*, 1 L. D., 390, 391. (Decided Feb. 16, 1883.)

Says Acting Secretary JOSLYN:

"Although it thus appears that the premises in question were covered by pre-emption filings both at the date of the grant and of the withdrawal thereunder, the record fails to discover that these pre-emptors possessed the prerequisite personal qualifications or that they had made such settlement as would operate to withhold the land from the operation of the railroad grant. The burden of proof rests upon Freeman to show affirmatively that at said dates a valid subsisting adverse right had attached to the premises. Such a state of facts can not be presumed."

Freeman v. *T. & P. R. R. Co.*, 2 L. D. 550. (Decided June 28, 1883.)

And see :

Ross v. *Poole*, 4 L. D. 116, (decided August 27, 1885).

S. P. R. R. Co. v. *Saunders*, 6 L. D., 98, (decided August 20, 1887).

In *Malone* v. *U. P. Ry. Co.*, 7 L. D. 13, (decided July 9, 1888) this settled doctrine of the department was reversed, and it was held by Secretary VILAS that the mere existence of a pre-emption filing, without more, would except the land covered thereby from the grant. The ground of the decision may be shown in a brief quotation :

" As already stated, the declaratory statement in the case of offered lands has the effect of reserving the land described in it from market for the time in which the party had the right to purchase. If such declaratory statement has the effect of a reservation or *quasi* withdrawal, it seems to me, on principle, that a declaratory statement for unoffered land (which is upon exactly the same footing) should have a similar effect."

The fault of this is that, as said by the circuit court, and as we have shown in Point I, the filing of the statement *does not* reserve the land, whether offered or unoffered. Some of the reasoning in this case is worthy of comic opera. Thus, where the secretary answers the objection that it did not appear that the filers had settled :

" It need not be shown. Such settlement is claimed thereby and the claim is of a right of pre-emption because of it."

This is not excelled by the logic of Poo Bah, by which the condemned escapes death because he is as good as dead.

Since this decision there has been no attempt to reason upon the question, but the rulings have followed this as a precedent.

Court Decisions.

With the exception of the decision in *Whitney* v. *Taylor*, 45 Fed. Rep., 616, which has been so ably criticised by Judge Riner in deciding the present case, and the dictum in the decision in *B. & M. R. R. Co.* v. *Abink*, (Neb.) 15 N. W. Rep., 317, every decision of this question by the courts sustains our contention.

In *Brown* v. *Corson*, 19 Pac. Rep. 66, the supreme court of Oregon, in a well reasoned opinion, held that a pre-emption filing would not, unless it was made by a qualified settler, except land from the grant to the California & Oregon company made by the act of July 25, 1866, 14 Stat. 239.

In *N. P. R. R. Co.* v. *Meadows*, 46 Fed. Rep., 254, the court says:

"I may say further I do not think the fact of making a filing alone of an application to pre-empt land, unaccompanied by any other acts, ought to be considered as a pre-emption claim at all, as that term is understood in law.

See also *Cahalan* v. *McTague*, 46 Fed. Rep., 251. (What is described in the statement of this case as an "application at the United States land office at Helena, Mont. to enter the said land under the land laws of the United States," made June 13, 1878, was simply the filing of a declaratory statement).

Ard v. *Pratt*, (Kas). 23 Pac. Rep. 646, 647.

N. P. R. R. Co. v. *Amacker*, 53 Fed. Rep. 48, 53.

Amacker v. *N. P. R. R. Co.*, (C. C. A). 58 Fed. Rep. 850, 852.

McLaughlin v. *Menotti*, (Cal). 26 Pac. Rep. 880, 881.
Emslie v. *Young*, 24 Kas. 732, 739 *et seq.*
Young v. *Goss*, (Kas). 22 Pac. Rep. 572, 573.
Un. Pac. Ry. Co. v. *Watts*, 2 Dill. 310, 312.
Sioux City etc. Land Co. v. *Griffey*, 143 U. S. 32, 41.
Wright v. *Gish*, (Mo.) 6 S. W. Rep., 704.

We submit that the decree of the circuit court should be affirmed.

FRED M. DUDLEY,
Attorney N. P. R. R. Co.

APPENDIX II.

Brief of Mr. Payson Referred to in the Foregoing Argument.

BEFORE THE

HONORABLE THE SECRETARY OF THE INTERIOR.

EX PARTE THE SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA.

Clear List No. 24.

Motion and Argument for Review.

MR. SECRETARY:

On August 3d, ult., you declined to approve this list for patent, on the ground that the case of Whitney *vs.* Taylor, 158 U. S. 85, is an authority that a "declaratory statement," though expired, if not formally canceled of record, not only excepts land in place limits from the operation of a land-grant, but also prevents the company from selecting the tract, if in indemnity limits.

It is not asserted in your opinion that the case of Whitney is directly in point, but you apply the reasoning in that case, which was one of a live, unexpired declaratory statement upon unoffered land in place limits,

under statutes then in full force, recognizing pre-emption entries, and distinction between offered and unoffered lands, to this case, which involves dead, expired filings upon lands in indemnity limits, and the statutes allowing pre-emption entries—repealed so long ago that rights under it are barred by lapse of time since its repeal, even—and all laws providing for or relating to "offered" and "unoffered" lands, long since repealed.

The decision sought to be reviewed is, in my judgment, erroneous.

The case is of sufficient importance to justify a thorough examination, not only because of the amount involved, some four thousand four hundred acres of land, but because the decision complained of overturns the well considered and uniform course of decisions in the land department, and the practice under them, for the past fifty years; decisions which have become rules of property for nearly two generations, as time is measured, and which, it is respectfully submitted, ought not to be overturned and reversed upon a mere deduction from a single authority, upon a different state of case and statute, upon mere parity of reasoning, as assumed.

I hope not to be tedious in making this argument comprehensive, but the importance of the case is my justification.

The lands were all surveyed, and partly "offered" lands, prior to the filing of the "declaratory statements", to be referred to later.

At this point it may be well to observe that whether the lands were "offered" or "unoffered" is unimportant, as the Act of March 3, 1891 (26 Stat., 1095, sec. 9), prohibits any further sale of public lands at public

sale; section 4 repeals the pre-emption laws, saving only *bona fide* claims, etc., "which may be perfected with the same limitations, forfeitures, &c.," as provided in the original acts.

Moreover, no lands have been subject to private entry since the act of March 2, 1889 (25 Stat., 854).

No question is made of the regularity of these selections.

Nearly all these declaratory statements were filed between 1871 and 1875, inclusive, all but five, while the Executive withdrawal made March 22, 1867, was operative.

All had "expired" years before the selections before you were made—many of them twenty years before.

Nothing appears to show that anything was done by the supposed settler beyond the filing of the ordinary "declaratory statement"; and on these facts, and such presumption as may be properly indulged in, you are asked to review and reverse the decision of August 3d.

I.

Whitney vs. Taylor is not an authority in point.

In that case the question was whether an actual settlement on and improvement of unoffered lands in place limits on January 16, 1854, followed by a declaratory statement May 28, 1857, which remained intact until December 23, 1886, was such a "claim" as excepted the land from the grant?

The filing was a *live, unexpired* filing.

Counsel for Taylor (adverse to the railroad title) claimed in his brief in the Supreme Court that the declaratory statement of Jones (the settler), made in 1857, long before the Act of Congress making the grant, "was in full force and effect *as a living claim of record*" (the italics are his) "until years subsequent to the definite location of the road opposite the land, viz., March 26, 1864, and the expiration of the lifetime of the filing being July 14, 1872."

As the grant was of lands "to which a pre-emption, etc., *claim may not have attached* at the time the line of said road is definitely fixed," it was argued that such settlement and unexpired filing constituted such *claim*, which excepted the track from the grant, and that title did not pass to the company.

The Court adopted this view: holding that the right of the company to land in place was fixed by the status of the land at definite location, March 26, 1864, and as *by law*, as it then stood, the filing was a live, unexpired one at that date, the land was excepted out of the grant.

That was the only question of law made or decided in Whitney *vs.* Taylor.

There was nothing whatever new in this.

It had been settled in the department for years that a live pre-emption filing existing at the date of attaching of rights under a railroad grant excepted lands in place limits from the grant, or from a withdrawal from the benefit of the grant.

Larsons case, 3 L. D., 305, so held.

So also

Emmerson *vs.* C. P. R. R. Co., 3 L. D., 117;
Malone *vs.* U. P. R'y. Co., 7 L. D., 13.

The latter case was exactly like Whitney *vs.* Taylor,

a live filing which did not expire until after definite location.

Some of the reasoning in Malone case is entirely erroneous and contrary to settled law, but the controlling point made and decided is exactly in line with the Whitney case.

So nothing new was decided in the last-named case.

But in the decision being reviewed, an entirely new rule is announced, reversing the course of decisions for years, and is, as I submit, entirely erroneous.

The law as to pre-emption and pre-emption filings or declaratory statements as found in the statutes and decisions of the courts, circulars of, and decisions by the Department, may be said to be as follows:

The Pre-emption laws, as re-enacted in the REVISED STATUTES, are as follows:

"SEC. 2263. Prior to any entries being made under and by virtue of the provisions of section twenty-two hundred and fifty-nine, proof of settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands lie, agreeably to such rules as may be prescribed by the Secretary of the Interior; and all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void."

"SEC. 2264. When any person settles or improves a tract of land subject at the time of settlement to private entry, and intends to purchase the same under the preceding provisions of this chapter, he shall, within thirty days after the date of such settlement, file with the register of the proper district a written statement describing the land settled upon, and declaring his intention to claim the same under the pre-emption laws; and he shall, moreover, within twelve months after the date of such settlement, make the proof, affidavit, and payment hereinbefore required. If he fails to file such written statement, or to make such affidavit, proof and

payment within the several periods named above, the tract of land so settled and improved shall be subject to the entry of any other purchaser."

"SEC. 2265. Every claimant under the pre-emption law for land not yet proclaimed for sale is required to make known his claim in writing to the register of the proper land office within three months from the time of the settlement; giving the designation of the tract, and the time of settlement; otherwise his claim shall be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of land, who has given such notice and otherwise complied with the conditions of the law."

"SEC. 2266. In regard to settlements which are authorized upon unsurveyed lands, the pre-emption claimant shall be in all cases required to file his declaratory statement within three months from the date of the receipt at the district land office of the approved plat of the township embracing such pre-emption settlement."

"SEC. 2267. All claimants of pre-emption rights, under the two preceding sections, shall, when no shorter time is prescribed by law, make the proper proof and payment for the land claimed within thirty months after the date prescribed therein, respectively, for filing their declaratory notices has expired."

The general pre-emption law was in operation from 1841 to March 3, 1891, when it was repealed. (26 Stat., 1097.)

Instructions were issued by the Commissioner of the General Land Office, from time to time, with the approval of the Secretary of the Interior, to the local land officers, for their guidance in the administration of the law.

In the circular September 15, 1841, to the Registers and Receivers of United States Land Offices, they are directed to note declaratory statements on the tract books in their respective offices *in pencil*, and they have always been so noted, and they also were noted

on the tract books in the General Land Office *in pencil*. The noting on the records of the declaratory statement in pencil shows that such statements were not an appropriation of the land, nor the equivalent of an entry, for the circular of September 28, 1842, says :

"Land *subject to private entry*, at the time of settlement thereon, *cannot be entered* by the settler under the law of 4th September, unless he shall file a declaratory statement, such as the 15th section of the Act requires, and *in due time* produce the necessary proof of his right, and make the affidavit required by the law."

The Circular of May 8, 1843, issued after the passage of the Act of March 3d of that year, says :

"Whenever the time prescribed for making proof and payment on a claim, by the law under which it originated, has *expired*, the provisions of the present Act do not apply."

Also that in case of the death of the settler before consummating his claim, that proof of his right and payment might be made by the executor, administrator, or one of the heirs, "during the *period* prescribed by law upon which the claim is founded."

The first circulars issued by the Commissioner of the General Land Office in an analogous case—State selections—were issued in 1846, and will be found in 1st. Lester, pp. 501, 502, and are as follows :

Circular of February 21, 1846 (1 Lester, p. 501) :

"CIRCULAR TO REGISTER AND RECEIVER—INTERNAL IMPROVEMENT SELECTIONS.

2d. If the State selects a tract of land *covered at the time* by the declaratory statement of a pre-emption, that fact does *not* invalidate the selection, if, at the *expiration* of the time allowed by law, the pre-emption claimant fails to establish his claim.

3d. When selections reported to this Office are found to conflict with the declaratory statements of pre-emptions, the approval of the selections thus covered by such statements will be suspended to await the result of the pre-emption claims, which if not established at the expiration of the period allowed by law, the selections of the State will then be approved; and this regulation will apply to all cases of selections heretofore made which have *not* already been finally disposed of by the Secretary of the Treasury. I am very respectfully.

Your obedient servant,

JAS. SHIELDS,
Commissioner."

Circular August 6, 1847 (1 Lester, p. 502):

"7th. That the action of this Office may be uniform, it is hereby determined, from the date of this circular, that when selections are reported to this Office which are found to conflict with declaratory statements of pre-emptors, the approval of that part of the selection *thus covered* by such statement, *together* with such portion as may not be interfered with, but which would be less than three hundred and twenty acres, of the *part covered* by the declaration should be *confirmed* to the claimant, will be suspended to await the *final* result of the pre-emption claims, which, if not established at the expiration of the period allowed by law, the selection of the State will then be approved."

"CIRCULAR."

"Public notice to settlers on land reserved for railroad purposes," dated February 10, 1870, Copp's L. Ls., pp., 403, 404.

"2nd. That where lands were surveyed at the date of settlement, and are within the lateral limits of withdrawals for railroad purposes, and such settlement was made prior to withdrawal, the settler will be required to file his declaratory statement, giving therein the date of settlement, within three months from the date of publication hereof by the Register and Receiver, and thereafter make proof and payment as provided by law. In the case of settlers on surveyed lands, which may hereafter be included within the limits of withdrawals for railroad purposes, they will be required to

file their declaratory statements, in conformity with the provisions of the pre-emption laws of 1841 and 1843, and to make proof and payment as provided by law.

A failure to file and make proof and payment, as specified herein, will forfeit the claim."

The General Land Office Circular of March 22, 1870, (Copp's Land Laws, p. 291) instructs the Register and Receiver, that—

" in all cases *hereafter*, settlers claiming pre-emption rights upon surveyed lands under the Act of March 27, 1854, aforesaid, shall be required to file their declaratory statements, and *make proof* and payment in like manner as other pre-emptors, in conformity with the requirements of the pre-emption laws of 1841 and 1843.

Settlers failing to comply with the requirements of this circular will be held *to have forfeited their claims as pre-emptors under the law.*"

The circular of July 30, 1870, says that:

" The settler on surveyed 'unoffered land' must file his or her declaratory statement within three months from the date of his or her settlement on such land, and within eighteen months from the expiration of said three months, make the proper proof and pay for such land.

" Where settlers had already filed before the passage of the Act (of July 14, 1870), they are required to make proof and payment within one year from such passage: therefore, all filings made prior to that date will expire by *limitation* of law, upon unoffered lands, on the 14th July, 1871."

The settler on unsurveyed land must file his or her declaratory statements within three months from the date of the receipt at the district land office of the approved plat of the township embracing the tract upon which he or she has settled, and, within eighteen months from the expiration of said three months, make

proper proof and pay for said tract. (Copp's Land Laws, p. 291.)

In General Land Office Circular of December 30, 1870, approved by Secretary DELANO, will be found the following instructions to the local land officers in regard to "Treatment of Pre-emption Claims" (Copp's Land Laws, pp. 306-307):

"2. Where the tract is subject to 'ordinary private entry' the pre-emption filing is no bar to the conditional entry of the land, either by cash, homestead, or other legally authorized disposal, it being understood that any such disposal, according to long established practice, will be subject to the right of the pre-emptor to prove up and consummate his entry within the twelve months allowed by law, without being compelled to give further notice to other parties, who at the time of such entry had notice of the existence of a prior-alleged pre-emption claim."

"4. Upon surveyed 'unoffered' lands not withdrawn from pre-emption you will also admit all filings properly offered within three months after alleged settlement, or within three months after the filing of the township plat of survey in your office. You will then hold the tract subject to pre-emption or homestead entry, *or to any selection authorized by law*, without requiring proof of the abandonment of prior filings—the disposal being always understood to be subject to the right of the pre-emptor to prove up and pay for his claim within *the twenty-one months* after settlement or the filing of the township plat, as the case may be."

"6. You *will treat* all filings upon lands which have once been 'offered' as abandoned after the lapse of twelve months from the alleged settlement, which is the statutory limitation, *and all filings upon 'unoffered lands' as abandoned after the lapse of twenty-one*

months after such alleged settlement or the filing of the township plat, unless within the period fixed by law proof and payment shall have been made, or legal tender of such proof and payment shall have been made and refused ; of which tender and refusal you will take care to make proper endorsement in each case."

"8. The pendency of contests between alleged pre-emptors who have merely filed for a tract, and who have not made actual entries, does not withdraw the land from market, but any right acquired by third parties subsequent to the initiation of contest, will be regarded as subject to the right of the contesting parties, &c."

"This rule is issued in accordance with a decision of the department proper, dated October 22, 1870."

The circular of September 8, 1873 (Copp's Land Laws, p. 391), referring specially to indemnity selections of lands covered by expired filings states, that--

"By the operation of law limiting the period within which proof and payment must be made in pre-emption cases, such claims are constantly expiring, the settler not appearing within such time to consummate his entry.

"These expired filings are classed with those actually abandoned or relinquished, and fall within the above instructions, unless explicit allegations are filed tending to show good faith in the settler until the definite location of the road."

The Railroad Circular, approved by the Secretary SCHURZ, November 7, 1879, page 6, paragraph 2, states that—

"Where application is made by a railroad company to select lands on which pre-emption filings have heretofore been made and canceled, or where the same have expired by limitation of law, no other claim or entry appearing of record, you will admit the selections, in accordance with the rules governing in the premises herein communicated. No proofs by the

companies concerning such claims will hereafter be required."

General circular March 20, 1883 (10 Copp, 39, approved by Secretary Teller):

"49. The existence of a pre-emption filing on a tract of land does not prevent another filing to be made for the same land, subject to any valid rights acquired by virtue of the former filing and actual settlement, if any."

"50. On *offered* lands proof and payment must be made within twelve months from date of settlement."

"51. If the land is *unoffered*, proof and payment may be made within thirty-three months from date of settlement."

"52. A failure to make proof and payment as prescribed by law, renders the land subject to appropriation by the *first legal* applicant."

General circular March 1, 1884, approved by Secretary TELLER, page 22, has this paragraph:

"Following the *accepted* practice in pre-emption cases, the filing of a declaratory statement will not be held to bar the admission of filings and entry by others; but any person making an entry or claim during the period allowed by law for the entry of the soldier will do so subject to his right; and the soldier's application when offered within such time will be allowed as a matter of right and operate to exclude the intervening claim."

All these circulars declare as the rule of the Department and law of the land, that in the absence of proof and payment within the time specified in the law, that the claim is ipso facto forfeited, and being forfeited, that it has ceased to exist as against any other disposal of the land by the United States under a grant, by selection, or by entry by individuals.

In August, 1884, the register and receiver at Montgomery, Alabama, refused to approve the applications of the agent of the State of Alabama, to select certain lands for the University of Alabama, because "the tracts contained therein are covered by expired pre-emption filings." The Commissioner affirmed on the ground that the same were "in conflict with prior claims of record. The Secretary of the Interior, in his decision of January 13, 1885 (3 L. D., 315, 317), reversed on the ground that "the reason given by the register and receiver is not sufficient to authorize their rejection." He also held that—

"an 'expired pre-emption filing' is no bar to receipt of an application for public land nor for suspension of an entry, and is never considered as a bar to issue of patent. Nor is it *the practice* to enter *formal cancellation* of such filings upon the books, nor take any action concerning them. They are simply treated as abandoned claims."

Upon the authority of this decision the circular of June 4, 1885 (3 L. D., 576), approved by Acting Secretary MULDROW, was issued declaring that—

"It is held by the Department that expired D. S. filings are to be regarded as abandoned claims, not requiring to be formally canceled on the records."

Under the law and the regulations of the Department as thus cited, expired declaratory statements are simply to be treated as abandoned claims. They have ceased to exist, and are no bar to a disposal of the land under other laws of the United States. Any legal claim to public lands may be made to attach to the land.

II.

An expired uncanceled pre-emption filing is not a bar to a selection of the land as indemniiy by a railroad company.

[NOTE. The argument on this point is omitted as it is not relevant to the question involved in the present case.]

III.

A pre-emption filing is not a bar to an entry of the land by another; it is simply a protection to the proposed entryman, if he shall fully comply; in the meantime the land is open to all entries and disposals, subject only to the preferred right of pre-emption.

In Field *vs.* Black, Secretary TELLER held:

"That the filing of the declaratory statement, which is 'a declaration of one's intention to claim a tract of land,' confers a mere preferred right of pre-emption against third persons, and confers no rights against the United States, and that, therefore, *land covered by such a filing is public land*, and open to either settlement or entry by any qualified person, subject only to the right of the pre-emptor, is *thoroughly settled* by the decisions of the courts and this department." (2 L. D., 581.)

"The pre-emption filing of Davis was of record at the date of Waller's entry, but such filing was of a nature not to be a bar to an entry. *Land covered by a pre-emption filing is still 'public land,'* open to settlement or entry subject only to the preferred right of pre-emption. (Field *vs.* Black, 2 L. D., 581)" Waller *vs.* Davis, 9 L. D., 262.

In order to except lands from a reservation created by Acts of Congress it is essential that "it must have been *entered bona fide* prior to the date of the Act, but a *mere filing* is not sufficient" to exclude the land from the reservation, notwithstanding the filings were made prior to the passage of the Act of Congress. (Ass't. Att'y. Gen. Shields, 12 L. D., pp. 86 and 30.)

"Pre-emption settlement and filing based thereon, do not confer a *vested* interest in the land, or any right upon the settler that will prevent subsequent disposal of the land by an Act of Congress (Ass't. Sec'y. Sims, 16 L. D., 526.)

"Where, however, a pre-emption filing has been made of public lands, the land covered thereby may be set apart by the President for such reservation at any time previous to payment and entry by the setttler under the pre-emption law." (16 Ops., 160.)

The pre-emption law was *always* construed as allowing any one to enter at private sale *offered* lands on which declaratory statements have been filed, the private entry, however, being subject to cancellation if the filer within the year made pre-emption proof and paid for the land. This construction of the law is set forth by Commissioner HENDRICKS in a letter to Secretary THOMPSON, of April 8, 1858 (1 Lester, 352). He said:

"Ever since the establishment of the pre-emption system it has been the practice of the different local offices to permit private entries of offered lands upon which declarations had been filed, such entries being understood by all parties to be subject to the right of the pre-emptors. In such cases, where the pre-emption claims are abandoned or impeached, the private entries hold good; or where the pre-emptions are proved up and entries approved and patented, the private entries are canceled."

A declaratory statement filed on unoffered lands never has been held as a bar to another settlement and filing.

"The pendency of a contest between pre-emption claimants does not operate to exclude pre-emption settlement and filing. Such settlement and filing can be made subject to the decision in the pending controversy.

"If the decision should recognize any valid adverse right, then the filing will be entirely inoperative; but if all claims in controversy should be rejected, then such filing would have full force and effect as in other cases." Opinion of Assistant Attorney-General SMITH, concurred in by Acting Secretary COWEN, August 21, 1871 (Copp's Land Laws, Ed. 1875, p. 292).

"By the 15th section pre-emption Act of 1841, proof, affidavit, and payment must be made within one year of settlement on *offered* land. A homestead entry having been made subject to existing pre-emption rights, and such pre-emption rights having failed by reason of not making proof, payment, etc., within a year, the homestead entry should stand."

Parsons *vs.* Petit, Copp's Land Laws, p. 321.

Acting Secretary JOSLYN in the case of the State of Alabama, claiming certain lands under a grant to the State for a university purposes, held that—

"An 'expired pre-emption filing' is no bar to a receipt of an application for public lands, nor for the suspension of an entry, and is never considered as a bar to the issue of a patent. Nor is it the practice to enter a *formal cancellation* of such filings upon the books, nor take any action concerning them. They are treated simply as abandoned claims. Neither is an expired filing of record treated in the practice of your office as a bar to the entry of the land by another applicant, but he takes subject to the pre-emptor's right to prove up and claim his preferred right before the expiration of the legal period." 3 L. D., 315, 317.

Under this decision a circular was issued by the Commissioner June 4, 1885, which was approved by Acting Secretary Muldrow, and stating: **"It is also held by the Department that expired D. S. filings are to be regarded as abandoned claims not requiring to be formally canceled on the records." 3 L. D., 576, 577.**

Land Office Circular, 1889, p. 9, provides:

"The existence of a pre-emption filing does not prevent another filing for the same land subject to any valid rights acquired by virtue of any former settlement and filing;" and on page 10, "Failure to make proof and payment, *as prescribed by law*, renders the land subject to appropriation by the first legal applicant."

Land under pre-emption filing is still public land and subject to timber-culture entry.

Waller *vs.* Davis, 9 L. D., 264.

IV.

A pre-emption filing does not constitute an appropriation of the land. It is only a notice of an intention to exercise a right of purchase. (1 L. D., 30; 1 L. D., 434; 1 L. D., 455; 4 L. D., 404; 7 L. D., 280; 8 L. D., 224; 9 L. D., 264.)

It differs from a homestead entry, which is a segregation of the land.

Hastings & Dakota R. R. Co. *vs.* Whiting, 132 U. S., 357, and cases cited;
Wolf *vs.* Struble, 1 L. D., 449, reversing;
Esrey *vs.* Gleen, 7 G. L. O., 148, the first and only case holding the contrary.

Therefore, *a fortiori*, an expired filing is no bar to any other disposition of the land to a legal claimant.

1 Lester, 352;
Alabama Selection Case, 3 L. D., 315, 317;
3 L. D., 576.

Because an expired filing raised the presumption that the claim has been abandoned.

10 L. D., 645;
11 L. D., 138;
12 L. D., 384;
3 L. D., 576.

Failure to comply within the time, under a pre-emption filing, defeats all rights as against an adverse claim.

Copp Ed., 1882, 563, 564, 566;
10 L. D., 387;
10 L. D., 485;
12 L. D., 529;
13 L. D., 209.

The filings are void if presented after the withdrawal ordered of the lands in controversy.

It is no longer an open question, since Spencer *vs.* McDougal, decided June 3, 1895, that a *de facto* withdrawal, even of all public lands in the State, is equivalent to a *de jure* withdrawal; and that no rights whatever can be initiated, even if followed by performance, which will avail a settler as against the railroad grant.

Same decision in W. V. & C. M. Wagon Road Co. *vs.* Hagan, 20 L. D., 259, so holds.

In that case there was no grant of specific lands, nor any provision for a withdrawal. The company was to get three sections out of six to be selected; no possible right to land until selection, and yet a withdrawal was made, and you held it must be respected, and was effective to protect the lands from settlement, "as though provided for in the Act," reversing Chapman's case (13 L. D., 61, and S. P. R. R. Co. *vs.* Brady, 5 L. D., 407 and 658).

To the same effect, as against a railroad withdrawal, are—

12 L. D., 214;
13 L. D., 432.

These filings are not only expired by operation of law but void, as shown by your records, because against an existing withdrawal.

Moreover, there was a legislative withdrawal of these lands never yet revoked.

VIII.

It only remains to discuss the reasoning in your decision of August 3d:

You quote from the opinion in Whitney *vs.* Taylor, where, after referring to the case of H. & D. R. R. Co. *vs.* Whitney (132 U. S., 357), and other cases, the court said,

"the principle to be deduced from them is that when on the records of the local land office there *is an existing claim* * * * under the homestead or pre-emption laws, not canceled or set aside, the tract * * * is excepted from the grant," etc.

That there is "no substantial difference between a declaratory statement and a homestead entry when both are noted on the land books" as to the effect upon the land under the grant.

You say:

"From the above it will be seen that the Court holds that a pre-emption filing, so long as it is permitted to remain of record, is a reservation as against the railroad grant. While it is true that the Court had under consideration in said case the effect of an unexpired filing upon a tract within the primary limits of the grant, yet the reasoning of said opinion applies with equal force to an expired and uncanceled filing on land

within the secondary or indemnity belt. The lands within the primary or indemnity limits are both granted, the particular difference between the two being the time of the attachment of rights. Within the primary limits the company's right attaches upon definite location, while within indemnity limits it does not attach until selection. But any claims that would serve to prevent the attachment of rights under the grant to a tract within the primary limits because existing at the date of definite location, would, by parity of reasoning, if existing at the date of selection of indemnity land, serve as a bar to the acceptance of such selection.

"For these reasons I herewith return the list under consideration without my approval."

Now, the case of Whitney involved a *live, unexpired* filing, and the effect of *such* a filing, whether it created, while so existing, a "pre-emption or other claim or right," within the exception in the grant.

And it will be noticed that every case cited or referred to, in the opinion of the court, either of judicial decisions or of the Interior Department, were cases of live, unexpired filings, existing when the right of the railroad company attached.

The court say: "Notice may also be taken of the rule prevailing in the Land Department," as indicative of what the law is, and cite, approvingly, Railroad Co. *vs.* Stovenour, 10 L. D., 645, where the precise difference I make here, and the doctrine I contend for here, is discussed and decided.

Stovenour's case decides—

(a) A live, unexpired pre-emption filing excepts the land from the grant.

(b) Such a filing raises the presumption of settlement and the existence of the pre-emption claim, conclusive as against the grant. But

(c) On the expiration of the statutory period, without proof of settlement and payment, the presumption

arises that all claims under such filing has been abandoned and no longer exist.

This case of Stovenour's the Supreme Court cite and approve.

Points *a* and *b* only, were involved in Whitney *vs.* Taylor.

So, I submit, that your deduction in the decision being reviewed, that "from the above it will be seen that the court holds that a pre-emption filing so long as it is permitted to remain of record is a reservation against the railroad grant," is not warranted.

The court takes special care to note that the filing of Jones was a *live* filing, an "existing claim;" that under the statute then in force he still had the right to make proof and payment, that "until that time arrived (when he was bound to make proof and payment) the filing protected the claim of the settler."

This was the status of the law when the company's right attached, and continued until July 14, 1870.

So all that can be seen in the case is that a *live*, existing pre-emption filing remaining of record is a reservation as against the grant, a very different proposition.

If, instead of a live filing, an expired one had been involved, there can be no doubt that the court would have held as I contend here.

It may be the proper place here to observe that some of the reasoning or statements made by the court, *arguendo*, are not accurate.

As, for instance, that a declaratory statement is practically the same as a homestead entry; each practically amounts to only a declaration of intention;

that the effect of one is exactly the same as the other, etc.

As to the case the court had in hand all this is true, but as statements of legal condition generally wholly erroneous.

All the cases—in court and in the Department—fully cited above uniform and conclusive, show, that a pre-emption filing does not segregate the land; is not an appropriation of it; other entries of every kind may be made upon it, subject to it, upon full performance by the pre-emptor, but valid, if the pre-emptor fails; while a homestead entry gives an interest *in* the land, excludes it from entry while existing, subject only to contest, with privilege to contestant if successful; in other words, a pre-emption filing, while alive, is only a notice of a conditional claim *ad rem;* while a homestead entry gives a *right in rem.*

See cases cited *supra.*

The ground upon which all these cases have been decided is that an existing "claim" brings the land which is subject thereto in place limits within the exception in the grant and so not granted. Not because the filing segregates the land, or is in any way an appropriation of it; this has not been intimated in any case where it was a question involved.

I deny that "the reasoning of said opinion applies with equal force to an expired and uncancelled filing on land within the indemnity belt."

The reasoning in the case of Whitney is all restricted to *existing live* claims, and based upon authorities deciding cases where *live* claims were involved, and in harmony with Department rulings on the same question, following and approving the De-

partment rulings, every one of which, as I have shown, hold with my contention here as to expired filings.

The reasoning cannot apply, because the questions are not analogous even.

Nothing is better settled than that the status of indemnity lands at date of selection fixes the right of the company to take or not.

I do not argue the question of the effects, if any, of expired filings on lands in place limits.

That is fully treated in the brief of Messrs. Britton and Gray in the matter of the N. P. R. R. Co. protest, to be heard with this, which brief I fully endorse.

The doctrine I have asserted is fortified by very many decided cases in the Department ; all uniform in their holding ; several of them approved by the Supreme Court.

The United States Circuit Court has, as shown, expressly decided the question as I argue here.

Not a judicial decision, or an intimation, *in dicta* or otherwise, by a court is believed to exist to the contrary.

And I earnestly insist that the settled recognized law of the Department and of the land, as declared and understood for fifty years, shall not be overturned by this decision of August 3d.

The list should be approved.

L. E. Payson,
Att'y. for S. P. R. R. Co.

APPENDIX III.

Act of March 3, 1887.

An Act to provide for the adjustment of land grants made by Congress in aid of the construction of railroads and for the forfeiture of unearned lands and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That the Secretary of the Interior be, and is hereby, authorized and directed to adjust, in accordance with the decision of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

SEC. 2. That if it shall appear upon the completion of such adjustments, respectively, or sooner, that lands have been from any cause heretofore erroneously certified or patented by the United States to or for the use or benefit of any company claiming by, through, or under grants from the United States to aid in the construction of the railroads, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued to such lands, and to restore the title thereof to the United States.

SEC. 3. That if in the adjustment of said grants it shall appear that the homestead or preemption entry of any *bona fide* settler has been erroneously canceled on account of any railroad grant, or the withdrawal of public lands from market, such settler, upon application, shall be reinstated in all his rights and allowed to perfect his entry by complying with the public-land law: *Provided*, That he has not located another claim, or made an entry in lieu of the one so erroneously canceled: *And provided also*, That he did not voluntarily abandon said original entry: *And provided further*, That if any of said settlers do not renew their application to be reinstated, within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public-land laws, with priority of right given to *bona fide* purchasers of said unclaimed lands, if any; and if there be no such purchasers, then to *bona fide* settlers residing thereon.

SEC. 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land-office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the Company which has so disposed of such lands of an amount equal to the Government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney-General shall cause suit or suits to be brought against such Company for the said amount: *Provided*, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified, or patented as aforesaid from recovering the purchase-

money therefor from the grantee company, less the amount paid to the United States by such company as by this act required: *And provided*, That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land-grant for conditions broken, or as authorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions.

SEC. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns: Provided, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the *bona fide* occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor:

Provided Further, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

SEC. 6. That where any such lands have been sold and conveyed, as the property of any railroad company, for the State and County taxes thereon, and the grant to such company has been thereafter forfeited,

the purchaser thereof shall have the prior right, which shall continue for one year from the approval of this act, and no longer, to purchase such lands from the United States at the Government price, and patents for such lands shall thereupon issue. Provided, That said lands were not, previous to or at the time of the taking effect of such grant, in the possession of or subject to the right of any actual settler.

SEC. 7. That no more lands shall be certified or conveyed to any State or to any corporation or individual, for the benefit of either of the companies herein mentioned, where it shall appear to the Secretary of the Interior that such transfers may create an excess over the quantity of lands to which such State, corporation or individual would be rightfully entitled.

Approved, March 3rd, 1887.